(22,264, 22,265, 22,266.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1910.

No. 643.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, AND CROWELL LUMBER & GRAIN COMPANY.

No. 644.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UPDIKE GRAIN COMPANY AND CROWELL LUMBER & GRAIN COMPANY.

No. 645.

UNION PACIFIC RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE UPDIKE GRAIN COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Page.
Caption	*a*
Transcript from the circuit court of the United States for the district of Nebraska	1
Caption	1
Petition	1

	Page.
Rule 4 and Rule 2*a*, *b*, and *c* of the American Railway Association.	2
Exhibit A—Freight tariff circular No. 888, June 27, 1906	9
B—Freight tariff circular No. 904, May 16, 1907	10
C—Rules of Union Stock Yards Company of Omaha	12
D—Order of Interstate Commerce Commission in case of Nebraska-Iowa Grain Co. and Others *vs.* Union Pacific Railroad Co.	13
Motion to make petition more specific	15
Answer	16
Jury impanelled; trial May 12, 1909	21
Reply	21
Trial May 13, 1909	22
Verdict and judgment, May 14, 1909	22
Order granting leave to file petition for new trial, etc	23
Motion for new trial	23
Motion to tax attorneys' fee and notice thereof	26
Order overruling motion for new trial and allowing attorneys' fee	27
Bill of exceptions	27
Caption to bill of exceptions	27
Testimony for plaintiffs	28
Defendant's objection to introduction of any evidence and exception to ruling thereon	28
Plaintiffs' Exhibit 1—Portions of order of Interstate Commerce Commission containing findings in favor of plaintiffs	29
Testimony of William H. Anderson	34
Charles F. Davis	39
William H. Anderson (recalled)	62
Willis S. Pool	68
George W. Cover	76
James H. Brady	86
Lawrence Kearney	92
John A. Kuhn	108
George W. Cover (recalled)	116
Plaintiffs' Exhibit 6—Reclaim per diem rules, effective April 1, 1904	117
Testimony of George W. Dodrill	125
Joel H. Wright, Jr	145
Lawrence Kearney (recalled)	160
Christopher C. Crowell, Jr	160
Arthur English	170
John A. Kuhn	174
John A. Kuhn (recalled)	176
Charles F. Davis (recalled)	178
Christopher C. Crowell, Jr. (recalled)	178
Defendant's motion for peremptory instruction and exception to ruling thereon	178
Amendment to 7th paragraph of answer	179
Agreement that reply shall stand as reply to answer as amended	179
Testimony for defendant	180
Testimony of Charles J. Lane	180
Offers of certain evidence by defendant	184
Motion to direct verdict for The Updike Grain Company	187

Page.
Motion to direct verdict for Nebraska-Iowa Grain Company..... 187
Motion to direct verdict for Crowell Lumber & Grain Company.... 187
Motion to direct verdict for defendant against each of the plaintiffs and exception to ruling thereon..... 188
Motion to direct verdict against Nebraska-Iowa Grain Co. and exception to ruling thereon 188
Motion to direct verdict against Crowell Lumber & Grain Co. and exception to ruling thereon..... 188
Motion to direct verdict against Updike Grain Company and exception to ruling thereon 188
Motion to direct verdict against Nebraska-Iowa Grain Co. upon cars returned after 48 hours and exception to ruling thereon..... 189
Motion to direct verdict against Crowell Lumber & Grain Co. upon cars returned after 48 hours and exception to ruling thereon..... 189
Motion to direct verdict against The Updike Grain Co. upon cars returned after 48 hours and exception to ruling thereon..... 189
Decision of the court 189
Charge to the jury and exception thereto..... 193
Defendant's exceptions to charge to the jury..... 193
Defendant's exhibits..... 194
1—Contract between Union Pacific Railroad Co. and Frank H. Peavey, February 7, 1899. 194
2—Supplemental agreement between Union Pacific Railroad Co. and Omaha Elevator Co., July 9, 1906..... 200
3—Contract between Union Pacific Railroad Co. and Trans-Mississippi Grain Co., August 1, 1905..... 202
4—Supplemental agreement between Union Pacific Railroad Co. and Trans-Mississippi Grain Co., March 8, 1906..... 208
5—Decision of Interstate Commerce Commission In matter of allowances to elevators, 10 I. C. C., 309 to 326 210
6—Decision of Interstate Commerce Commission In matter of allowances to elevators, April 9, 1907, 12 I. C. C., 86 to 95.. 225
7—Decision of Interstate Commerce Commission on rehearing In matter of allowances to elevators, June 29, 1908, 14 I. C. C., 315 and 316..... 237
8—Decision of Interstate Commerce Commission in Traffic Bureau, Merchants' Exchange *vs.* Railroads, June 29, 1908, 14 I. C. C., 317..... 240
Plaintiffs' exhibits..... 257
4—Statement of vouchers covering elevation charges in favor of Omaha Elevator Co., June 26, 1906, to December 31, 1907. 257
5—Statement of vouchers covering elevation charges in favor of Trans-Mississippi Grain Co., June 26, 1906, to December 31, 1907..... 258
Stipulation that record contains all of the evidence..... 258
Stipulation as to bill of exceptions..... 258
Prayer for allowance of bill of exceptions..... 259
Certificate of judge to bill of exceptions 259
Assignment of errors..... 260
Petition for writ of error..... 263
Order allowing writ of error..... 263
Supersedeas bond... 264
Writ of error and clerk's return..... 265

Page.
Citation and acceptance of service 267
Præcipe for transcript 268
Stipulation as to record upon writs of error 269
Clerk's certificate to transcript 270
Appearance of counsel for plaintiff in error 271
Appearance of counsel for defendant in error 271
Order of submission 272
Opinion 272
Nisi judgment of April 18, 1910 280
Certified copy of remittitur by The Updike Grain Company 281
Certified copy of remittitur by Crowell Lumber & Grain Company 282
Final judgment of United States circuit court of appeals, June 18, 1910 284
Petition for writ of error from Supreme Court of the United States as to all defendants in error 284
Assignment of errors on writ of error from Supreme Court of the United States as to all defendants in error 286
Supersedeas bond on writ of error from Supreme Court of the United States as to all defendants in error 297
Writ of error from Supreme Court of the United States as to all defendants in error and clerk's return 299
Citation on writ of error from Supreme Court of the United States as to all defendants in error and admission of service 300
Petition for writ of error from Supreme Court of the United States as to defendants in error The Updike Grain Company and Crowell Lumber & Grain Company 301
Assignment of errors on writ of error from Supreme Court of the United States as to defendants in error The Updike Grain Company and Crowell Lumber and Grain Co 303
Supersedeas bond on writ of error from Supreme Court of the United States as to defendants in error The Updike Grain Company and Crowell Lumber & Grain Company 314
Writ of error from Supreme Court of the United States as to defendants in error The Updike Grain Company and Crowell Lumber & Grain Company and clerk's return 316
Citation on writ of error from Supreme Court of the United States as to defendants in error The Updike Grain Company and Crowell Lumber & Grain Company and admission of service 318
Petition for writ of error from Supreme Court of the United States as to defendant in error The Updike Grain Company 319
Assignment of errors on writ of error from Supreme Court of the United States as to defendant in error The Updike Grain Co 321
Supersedeas bond on writ of error from Supreme Court of the United States as to defendant in error The Updike Grain Company 330
Writ of error from Supreme Court of the United States as to defendant in error The Updike Grain Company and clerk's return 331
Citation on writ of error from Supreme Court of the United States as to defendant in error The Updike Grain Company and admission of service 333
Stipulation as to transcript on writs of error 334
Clerk's certificate to transcript 336

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1909, of said Court, before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John A. Riner, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the twenty-fifth day of August, A. D. 1909, a transcript of record pursuant to a writ of error directed to the Circuit Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein the Union Pacific Railroad Company was Plaintiff in Error and the Updike Grain Company, The Nebraska-Iowa Grain Company and The Crowell Lumber & Grain Company were Defendants in Error, which said transcript of record was filed, docketed and printed as case No. 3135, and is in the words and figures following, to-wit:

1 Pleas, before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, sitting in the Circuit Court of the United States for the District of Nebraska, within the Eighth Judicial Circuit, at the April 1909 term of the Omaha Division of said Court.

2 Be it Remembered, that on the 4th day of March, 1909 Petition was filed in the Clerk's office of the Circuit Court of the United States for the District of Nebraska, Omaha Division, which said Petition is in words and figures following, to-wit:

In the Circuit Court of the United States, for the District of Nebraska. Omaha Division.

The Updike Grain Company, a corporation, the Nekraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants,

vs.

The Union Pacific Railroad Company, Defendant.

Petition.

The complainants and each of them complain against the defendant and allege:

1. That the complainants and each of them are corporations duly and legally organized, and at all times mentioned herein have been engaged in the business of buying, selling and shipping grain in carload lots and in operating transfer elevators; that the transfer elevator of the Updike Grain Company is located upon the tracks of the Union Stock Yards, in South Omaha, Nebraska; that the elevator of the Nebraska-Iowa Grain Company has at all times been located upon the tracks of the Chicago, Burlington & Quincy Railroad Company, in the City of Omaha; that the elevator of the Crowell Lumber & Grain Company has at all times been located upon the tracks of the Chicago, St. Paul, Minneapolis & Omaha Railway Company, in the City of Omaha.

2. That the defendant, the Union Pacific Railroad Company, is a common carrier engaged in the transportation of passengers and property by railroad between points in
3 the State of Nebraska and points in the States of Iowa, Wyoming and Colorado, and as such common carrier is subject to the provisions of the Act to Regulate Commerce approved February 4th, 1887, and Acts amendatory thereof and supplementary thereto.

3. That on the 27th day of June, 1906, the Union Pacific Railroad Company issued and published its tariff known as G. F. O. No. 888, the same to become effective on that day, said order being duly filed with the Interstate Commerce Commission and being I. C. C. No. 2029; that said order was thereafter superseded by Union Pacific order and freight tariff known as G. F. O. No. 904, filed with the Interstate Commerce Commission and designated as I. C. C. No. 2107, issued May 16th, 1907, effective June 1st, 1907. Copies of said orders and tariffs are hereto attached marked, respectively "Exhibit A" and "Exhibit B," and are made parts hereof.

4. That prior to the issuance of said circulars by the Union Pacific Railroad Company, the American Railway Association, of which association all the railroads referred to in this petition are members, adopted rules governing the movement, delivery and use of cars, which rules have at all times mentioned herein been in force, and among which rules are the following:

"Rule 4. Cars received loaded in switching service must be confined to switching territory and when made empty must be returned to the owner if a direct connection within that territory or otherwise to the road from which received or may be loaded in accordance with Rule 2, a, b or c."

Rule 2, a, b and c, referred to in Rule 4, is as follows:

"Rule 2, (a). Loaded via any route so that the home road will participate in the freight rate.

"(b). Loaded to the road from which originally received, if such loading is in the direction of the home road, but not otherwise.

"(c). Loaded to an intermediate road in the direction of the home road."

5. Complainants allege that from June 27th, 1906, down to the present time, transfer elevators have been located in Omaha, South Omaha and Council Bluffs, the elevators owned and operated by the Omaha Elevator Company, the Trans-Mississippi Grain Company and J. F. Twamley & Son being located upon the tracks of the Union Pacific Railroad Company, while other transfer elevators belonging to the complainants herein have been located upon the tracks of other lines of road entering Omaha, South Omaha and Council Bluffs, as hereinbefore specifically described.

6. That prior to May 1st, 1906, the Union Stock Yards Company made and published its rules for the handling of

cars when made empty, and which rule is hereto attached, marked "Exhibit C" and made a part hereof; that said rules were made with the knowledge, consent and approval of the Union Pacific Railroad Company, and were the result of an agreement between the Union Stock Yards Company and the several railroads whose lines enter Omaha and South Omaha.

7. Complainants allege that from June 27th, 1906, down to the 1st day of January, 1908, the Union Pacific Railroad Company defendant herein, allowed and paid to those companies whose elevators were located upon the tracks of the Union Pacific Railroad Company at Omaha, South Omaha and Council Bluffs, the elevation charge and allowance provided for in G. F. O. No. 888 and G. F. O. No. 904, hereinbefore referred to, where the grain originated at points on the Union Pacific Railroad west of and including Gilmore, Nebraska, and was transported by the Union Pacific from such originating point to Omaha, South Omaha or Council Bluffs, such elevation charge or allowance being paid to those elevators whether the grain was loaded in foreign cars or in Union Pacific cars, or both, provided only the grain moved to points beyond Council Bluffs, Iowa; but these complainants allege that the Union Pacific Railroad Company has not paid and has refused to pay said elevation allowance to these complainants and each of them on shipments originating at points on the Union Pacific west of and including Gilmore, Nebraska, where such grain was transported by the Union Pacific Railroad Company from such originating point to Omaha, South Omaha or Council Bluffs, where such grain moved to points beyond Council Bluffs, Iowa, and was actually transferred by these several complainants at their elevators in Omaha, South Omaha or Council Bluffs. These complainants charge and allege the fact to be that the provision in G. F. O. No. 888 and G. F. O. No. 904, requiring as a condition precedent to the payment of such elevation allowance that such cars, when made empty must be returned to the Union Pacific Railroad Company within 48 hours and that no allowance would be made where more than 48 hours elapse between the time of delivery of the loaded car by the Union Pacific Railroad Company to the switching line and the release and return of the empty car to the Union Pacific Railroad, is and at all times has been unjust, unreasonable, discriminatory and illegal; that 48 hours is not and was not a reasonable time within which to move said car from a transfer track to the transfer elevator of these complainants and each of them, unload said car and cause the same to be replaced upon said transfer track; that 4 days is a reasonable time within which to perform said service, and these complainants allege and charge that

6 the above mentioned provision in G. F. O. No. 888 and G. F. O. No. 904 was inserted for the purpose of giving to those elevators located upon the tracks of the Union Pacific Railroad Company a preference and advantage over those transfer elevators belonging to these complainants located upon other lines of road and tracks as hereinbefore alleged, and to reach which switching service is necessary, and these complainants and each of them charge and allege that such provision in G. F. O. No. 888 and G. F. O. No. 904 does in fact give an unjust, unreasonable and illegal advantage and preference to the transfer elevators located upon the lines of the Union Pacific Railroad Company, and for that reason is unjust, illegal, discriminatory and in violation of the provisions of the Act to Regulate Commerce, referred to in paragraph 2 hereof.

8. These complainants show that between the 26th day of June, 1906, and the 1st day of June, 1907, inclusive, the Updike Grain Company loaded at its stations and purchased at different stations on the line of the Union Pacific Railroad Company in the State of Nebraska west of Gilmore, large numbers of cars of grain; that in each instance said grain was loaded in cars furnished the shipper by said Railroad Company; that each of said cars was loaded with grain which moved to points beyond Council Bluffs, Iowa; that when said cars reached Omaha, the same were transferred at the transfer elevator of said Updike Grain Company; that in order to reach the transfer elevator of said Updike Grain Company, said cars were placed on a transfer switch owned and used jointly by the Union Pacific Railroad Company and the Union Stock Yards Company, from which transfer switch they were thereafter moved to the transfer elevator of the Updike Grain Company; that in each and every instance said cars were
7 unloaded by the Updike Grain Company within 24 hours from the time they were placed upon said transfer track adjoining the transfer elevator of the Updike Grain Company, and in each and every instance were unloaded within 48 hours from the time they were placed upon said transfer track by the Union Pacific Railroad Company; that each and all of said foreign cars, when unloaded, were turned back to the Union Stock Yards Company and were by said Stock Yards Company delivered to the several owners in accordance with said circular, "Exhibit B," herein referred to, or were in each and every instance re-loaded and delivered loaded as routed, as provided for in said circular; that each and all of said foreign cars so transferred by the Updike Grain Company were again loaded by it, the cars belonging to the lines entering Omaha being loaded and sent out over their re-

spective lines, and those belonging to lines not entering Omaha, or South Omaha being loaded and delivered loaded as routed; that during said time the said Updike Grain Company transferred at its elevator 103 cars of grain, containing in the aggregate 6,457,140 lbs., and which cars were returned to the Union Pacific within 48 hours; and between said dates it unloaded and transferred at its elevator 313 cars belonging to roads having a direct connection within the switching territory, and which cars when made empty were returned to the owners thereof; that said cars contained in the aggregate 20,585,820 lbs. of grain; that during said period of time it unloaded and transferred 355 cars belonging to foreign roads having no direct connection within the switching territory and which cars when made empty were loaded in the direction of the home road or so that the home road would participate in the freight rate, and that said cars contained in the aggregate 23,436,960 lbs. of grain; and during said time the said Updike Grain Company unloaded 54 cars belonging to foreign
8 roads and to the Union Pacific Railroad Company, and which cars were thereafter returned to said Union Pacific Railroad Company, said cars containing in the aggregate 3,456,230 lbs. of grain. Complainants allege that by the payment of said elevation allowance to the Omaha Elevator Company, the Trans-Mississippi Grain Company, and other competitors of the Updike Grain Company, and by failing and refusing to pay the same to the Updike Grain Campany, the said Updike Grain Company was damaged and suffered loss and damage in the sum of $6742.10, no part of which has been paid.

9. Complainants allege that between the 2nd day of July, 1906, and the 22nd day of July, 1907, the Nebraska-Iowa Grain Company loaded at stations and purchased at different stations on the line of the Union Pacific Railroad Company in the state of Nebraska, west of Gilmore, large numbers of cars of grain; that in each and every instance said grain was loaded in cars furnished said Grain Company by said Railroad Company; that each of said cars was loaded with grain which moved to points beyond Council Bluffs, Iowa; that each of said cars was transferred at the elevator of said Nebraska-Iowa Grain Company loaded as aforesaid; that to reach said transfer elevator said cars were placed on a transfer switch owned and used jointly by the Union Pacific Railroad Company and the Chicago, Burlington & Quincy Railroad Company, from which transfer switch they were thereafter moved to the elevator of the said Nebraska-Iowa Grain Company; that said switching service was performed under an agreement between the said Railroad Companies and to which agreement the said Grain Company was not a party; that

the said Union Pacific Railroad Company charged, collected and received payment for the entire switching service, including the switching of said car to said transfer elevator and the switching of the same from said transfer elevator; that in
9 each and every instance said cars were unloaded at said elevator within 24 hours from the time they were placed on the track adjacent to said elevator, and in each and every instance were unloaded within 48 hours from the time they were placed upon the transfer track by the Union Pacific Railroad Company. Complainant alleges that 183 carloads of grain so transferred by the Nebraska-Iowa Grain Company during said period of time contained in the aggregate 12,104,900 lbs., all of which cars when made empty were returned to the Union Pacific Railroad Company within said 48 hour period; and during said time it unloaded and transferred 14 cars, which cars belonged to the Chicago, Burlington & Quincy Railroad Company, and when made empty were retained in the possession of said road; that said cars contained in the aggregate 877,820 lbs. of grain; and during said period of time said grain company unloaded 110 cars belonging to foreign roads or to the Union Pacific Railroad, and which cars were delivered back to the Union Pacific Railroad by the switching line before referred to, and which cars contained in the aggregate 7,722,-040 lbs. This complainant alleges that by the payment of said allowance to its competitors, the Omaha Elevator Company, the Trans-Mississippi Grain Company, and others, and by failing and refusing to pay the same to the Nebraska-Iowa Grain Company, the said Nebraska-Iowa Grain Company was damaged and suffered loss and damage in the sum of $2,509.74, no part of which has been paid.

10. Complainants allege that between the 1st day of July, 1906, and the 30th day of December, 1907, the Crowell Lumber & Grain Company loaded at stations and purchased at different stations on the line of the Union Pacific Railroad Company in the state of Nebraska west of Gilmore, large numbers of cars of grain; that in each and every instance
10 said grain was loaded in cars furnished therefor by the said Railroad Company; that in each and every instance, said cars of grain moved to points beyond Council Bluffs, Iowa; that each of said cars was transferred at the elevator of the Crowell Lumber & Grain Company; that to reach said elevator said cars were placed on a transfer switch owned and used jointly by the Union Pacific Railroad Company, and the Chicago, St. Paul, Minneapolis & Omaha Railway Company, from which transfer switch they were thereafter moved to the transfer elevator of the Crowell Lumber & Grain Company; that said switching service was performed under an agreement between said Railroad Companies, to which said agreement

said Grain Company was not a party; that said Union Pacific Railroad Company charged, collected and received payment for the entire switching service, including the switching of said cars to the transfer elevator and the switching of the same from said transfer elevator; that in each and every instance said cars were unloaded at said elevator within 24 hours from the time they were placed on said track adjacent to said elevator, and in each and every instance were unloaded within 48 hours from the time they were placed upon the transfer track by the said Union Pacific Railroad Company. Complainant alleges that 33 carloads of grain containing in the aggregate 2,004,9..0 lbs. were transferred during said period of time, said cars when made empty being returned to the Union Pacific Railroad Company within said 48 hour period; that during said period of time, it transferred at its said elevator 8 cars, containing in the aggregate 532,310 lbs. of grain; that said cars and each of them belonged to the switching line above referred to, and when made empty were retained in its possession; that during said time, it unloaded and transferred at its elevator 58 cars, containing in the
11 aggregate 3,669,340 lbs.; that said cars and each of them when made empty were returned to the Union Pacific Railroad Company. Complainant alleges that by the payment of said elevation allowance to the Omaha Elevator, the Trans-Mississippi Elevator Company, and other competitors of the Crowell Lumber & Grain Company, and by failing and refusing to pay the same to the Crowell Lumber & Grain Company, the said Crowell Lumber & Grain Company was damaged and suffered loss and damage in the sum of $698.29, no part of which has been paid.

11. These complainants and each of them allege that during all the period of time mentioned herein, the defendant herein was paying and did pay to the Omaha Elevator Company, the Trans-Mississippi Grain Company and other competitors of these complainants, whose elevators were located in Omaha, South Omaha or Council Bluffs, the elevation allowance provided for and mentioned in Exhibits A and B hereinbefore referred to; that said allowance was paid whether said grain arrived in Union Pacific cars or in cars belonging to foreign lines. They allege that the switching service hereinbefore referred to was in no instance under the control or direction of these complainants or each of them; that said switching to and from said elevators was performed by the several switching lines under contracts between the several switching lines and the Union Pacific Railroad Company, with which several contracts or arrangements neither of these complainants was a party or over which they or either of them had any control,

and they allege that the provisions in said Exhibit A and B relative to the return of said cars when made empty within the time therein mentioned was unjust, unreasonable, illegal and discriminatory, and was placed therein for the purpose of giving to those elevators located upon
12 the line of the Union Pacific Railroad Company an unjust and illegal advantage over the complainants herein.

12. These complainants and each of them allege that heretofore, to-wit:—in the month , 1908, they and each of them filed with the Interstate Commerce Commission of the United States, their several complaints charging the Union Pacific Railroad Company with discrimination against them in the matters and things hereinbefore set forth; that the several complaints charged the defendant herein with discriminating against these several complainants on account of said elevation allowance so paid to their several competitors, and which payment was refused by the defendant herein to these [complaints]; that in their several complaints, the [complaints] herein set forth the transfer of said cars of grain as hereinbefore alleged, the refusal of the defendant to pay said elevation allowance to the several complainants, the payment of said allowance to their said competitors, and prayed that reparation be granted to them; that thereafter issue was joined between the said several complainants and the said Union Pacific Railroad Company; that thereafter, said several complaints came on for hearing upon the pleadings and the evidence, and by agreement of the Commission and the several parties thereto, said complaints were submitted together, and thereafter, to-wit: on the 6th day of January, 1909, the said Commission at its session held on that date, issued its order, a copy of which is hereto attached, marked "Exhibit D" and made a part hereof; that said order was a joint order and the award for damages to each of the several complainants herein was made by a single order of the Interstate Commerce Commission; that by said order the defendant herein was ordered to pay to the several parties hereto on or before the 1st day of
13 March, 1909, the following sums, with interest from July 1st, 1907, to-wit:

To the Updike Grain Company,	$6,742.10
To the Nebraska-Iowa Grain Company,	$2,509.74
To the Crowell Lumber & Grain Company,	$698.29

The complainants and each of them allege that the said defendant has failed and refuse and still fails and refuses to comply with the order of said Commission and paid said amounts or any part thereof.

13. Complainants allege that by reason of the unjust, unreasonable and illegal discrimination hereinbefore set forth, they and each of them have suffered damages as hereinbefore alleged.

Wherefore, the complainants and each of them pray judgment against the defendant herein, as follows, to-wit:

In favor of the Updike Grain Company in the sum of $6742.10 and interest from July 1st, 1907, together with the costs of this action, including a reasonable attorneys fee to be taxed by this court.

In favor of the Nebraska-Iowa Grain Company, in the sum of $2509.74 and interest from July 1st, 1907, together with the costs of this action, including a reasonable attorneys fee to be taxed by this court.

In favor of the Crowell Lumber & Grain Company in the sum of $698.29 and interest from July 1st, 1907, together with the costs of this action, including a reasonable attorneys fee to be taxed by this court.

THE UPDIKE GRAIN COMPANY,
THE NEBRASKA-IOWA
GRAIN COMPANY,
CROWELL LUMBER &
GRAIN COMPANY,

By Smyth & Smith,
Their Attorneys.

14 Exhibit A.

I. C. C. 2029.

Union Pacific Railroad Company
Freight Tariff.
Circular.
888.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of one and one-fourth cents per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service on grain in carloads, transferred by the elevators at South Omaha, Omaha, Council Bluffs and Kansas City, subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska, and Muncie, Kansas, and be transported by Union Pacific R. R. from such originating points to South Omaha, Omaha, Council Bluffs, Kansas City, Kansas, or Kansas City, Mo., respectively.

2nd. The allowance will apply only on grain which moves to points beyond Council Bluffs, Iowa, or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of loads by the Union Pacific to the elevator, or connecting lines and the release and return of the empty to the Union Pacific. The forty-eight hour limit will be computed from the time of delivery of the loaded by the Union Pacific to elevators located on its own tracks and the release of such cars by those elevators, or from the time of delivery by the Union Pacific to the recognized points of interchange with connecting lines for elevators on lines other than the Union Pacific and the return of the empty car by the connecting lines to recognized points of interchange.

15 4th. Elevator companies, in presenting their claims for the above allowance must substantiate, by duly certified records of connecting lines, the re-shipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

Issued June 27, 1906. Effective June 27, 1906.

By J. A. Munroe,
Freight Traffic Manager, Union Pacific R. R.,
Omaha, Neb.

Charles J. Lane,
1st A. G. F. A. Union Pacific R.R.
Omaha, Neb.

Elmer H. Wood,
G. F. A. Union Pacific R. R.
Omaha, Neb.

W. H. Garratt,
A.G.F.A. Union Pacific R. R.
Omaha, Neb.

H. G. Kaill,
A.G.F.A. Union Pacific R. R.
Kansas City, Mo.

16 Exhibit B.

I. C. C. No. 2107.
Supersedes No. 2029.

Circular U. P. G. F. O. No. 904.
Supersedes No. 888.
Union Pacific Railroad Co.
The Topeka & Northwestern Railroad Company.

Allowance to elevators located at South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., and Kansas City, Mo., for Transferring Grain to Secure Prompt release of Cars.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of three-fourths of one cent per 100 pounds, will be made by the Union Pacific R. R. to the elevators performing the service, on grain, in carloads,

transferred by the elevators at South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., and Kansas City, Mo., subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R., or the Topeka & Northwestern R. R. (not connecting lines), west of and including Gilmore, Nebraska, and Muncie, Kas., and be transported by Union Pacific R. R. or by the Topeka & Northwestern R. R. and Union Pacific R. R. from such originating points to South Omaha, Omaha, Neb., Council Bluffs, Ia., Kansas City, Kas., or Kansas City, Mo., respectively.

2nd. The allowance will apply only on grain which moves to points beyond Council Bluffs, Ia., or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of load by the Union Pacific R. R. to the elevator, or connecting lines and the release and return of the empty cars to the Union
17 Pacific R. R. The forty-eight hour limit will be computed from the time of delivery of the loaded cars by the Union Pacific R. R. to elevators located on its own tracks and the release of such cars by those elevators, or from the time of delivery by the Union Pacific R. R., to the recognized points of interchange with connecting lines for elevators on lines other than the Union Pacific R. R., and the return of the empty cars by the connecting lines to recognized points of interchange.

4th. Elevator companies, in presenting their claims for the above allowance must substantiate, by duly certified records of connecting lines, the re-shipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

Issued and Mailed to I. C. C.
May 16, 1907.

Effective June 1, 1907.
By order of Interstate Commerce Commission.

J. A. Munroe,
Freight Traffic Manager,
Omaha, Neb.

Union Pacific Railroad,
The Topeka & Northwestern R. R.

Elmer H. Wood,
G. F. A. Union Pacific R. R.
T. & N. W. R. R.
Omaha, Neb.

C. J. Lane,
1st A.G.F.A. Union Pacific R.R.
T. & N. W. R. R.
Omaha, Neb.

W. H. Garratt,
A.G.F.A. Union Pacific R. R.
T. & N. W. R. R.
Omaha, Neb.

H. G. Kaill,
A.G.F.A. Union Pacific R.R.
T. & N. W. R. R.
Kansas City, Mo.

18

Exhibit C.

Union Stock Yards Company of Omaha (Limited)

Rules to Govern Handling of Box, Furniture, Flat, Coal and Refrigerator Cars, Empty, or when loaded by Industries located on Union Stock Yards Company's Tracks.

Effective May 1, 1906, and cancelling Circular of April 15, 1906, empty cars lettered as below, regardless of road via which they may have arrived, will be delivered as follows:

Lettered	Deliver to	Lettered	Deliver to
C. P. R. R.	U. P. R. R. Co.	I. C. R. R.	I. C. R. R. Co.
G. H. & S. A. R. R.	do	St. L. B. & S. Ry.	do
H. & T. C. R. R.	do	C. M. & St. P. Ry.	C. M. & St. P. Ry.
L. W. R. R.	do	B. & M. R. R. R.	C. B. & Q. R. R. Co.
M. L. & T. R. R.	do	C. B. & K. C. R. R.	do
N. Y. T. & M. Ry.	do	C. B. & Q. R. R.	do
O. & C. R. R.	do	H. & St. J. R. R.	do
O. R. & N. Co.	do	J. & St. L. Ry.	do
O. S. L. R. R.	do	K. C. & St. J. & C. B. R. R.	do
S. P. R. R.	do	St. L. K. & N. W. R. R.	do
T. & N. O. R. R.	do	B. C. R. & N. Ry.	C. R. I. & P. Ry. Co.
U. P. R. R.	do	C. R. I. & E. P. Ry.	do
C. & N. W. Ry.	C. & N. W. Ry. Co.	C. R. I. & G. Ry.	do
F. E. & M. V. Ry.	do	C. R. I. & M. Ry.	do
C. B. Ry.	Mo. Pac. Ry.	C. R. I. & P. Ry.	do
C. B. U. P. Ry.	do	C. R. I. & T. Ry.	do
F. S. W. & W. Ry.	do	C. N. R. R.	do
H. C. A. & N. Ry.	do	C. O. & G. R. R.	do
K. C. & N. W. R. R.	do	St. L. K. C. & C. R. R.	do
L. R. & F. S. Ry.	do	Wabash.	Wabash R. R. Co.
M. P. Ry.	do	C. G. W. Ry.	C. G. W. Ry. Co.
St. L. F. S. & W. Ry.	do	C. St. P. & K. C. Ry.	do
St. L. I. M. & S. Ry.	do		
S. L. V. Ry.	do		

Cars lettered as above, if loaded by industries located on this company's tracks and otherwise routed, will not be delivered, but will be returned for unloading, and a charge of $5 per car will be assessed against the loader.

Cars other than those provided for above, will be considered foreign cars and are returnable either loaded or empty to the road from which received. If loaded by industries located on the tracks of this company and otherwise routed, for-

19 eign cars—except those received from the U. P. R. R. Co.—will not be delivered, but will be returned for unloading, and a charge of $5 per car will be assessed against the loader.

Foreign cars received from the U. P. R. R. Co. may be delivered, loaded, as routed.

J. H. BRADY,
Superintendent.

Order.

20 At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 6th day of January, A. D. 1909.

Present:

Martin A. Knapp,	:	
Judson C. Clements,	:	
Charles A. Prouty,	:	
Francis M. Cockrell,	:	Commissioners.
Franklin K. Lane,	:	
Edgar E. Clark,	:	
James S. Harlan,	:	

No. 1628.
Nebraska-Iowa Grain Company
v.
Union Pacific Railroad Company.

No. 1642.
Crowell Lumber & Grain Company
v.
Same.

No. 1655.
Updike Grain Company,
v.
Same.

No. 1644.
Cavers Elevator Company.
v.
Same.

No. 1775.
Nye-Schneider-Fowler Grain Company.
v.
Same.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon:

21 It is ordered, That defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1628, the Nebraska-Iowa Grain Company, the sum of $2,509.74 with interest thereon at the rate of 6 per cent per annum from July 22nd, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby refered to and made a part of this order.

It is further ordered, That defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1775, the Nye-Schneider-Fowler Grain Company the sum of $1,560.79, with interest thereon at the rate of 6 per cent per annum from December 31, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

It is further ordered, That defendant Union Pacific Railroad Company be and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1642, the Crowell Lumber & Grain Company, the sum $698.29, with interest thereon at the rate of 6 per cent per annum from December 26, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked
22 undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

It is further ordered, That defendant Union Pacific Railroad Company be and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1655, the Updike Grain Company, the sum of $6,742.10, with interest thereon at the rate of 6 per cent per annum from July 1, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said

complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

And it is further ordered, That defendant Union Pacific Railroad Company be and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1644, the Cavers Elevator Company, the sum of $1,013.71 with interest thereon at the rate of 6 per cent per annum from July 9, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

23 State of Nebraska,
County of Douglas—ss.

N. B. Updike, being first duly sworn, deposes and says he is the president of the Updike Grain Company, one of the complainants herein, and the statements in the foregoing petition are true as affiant verily believes.

N. B. UPDIKE.

Subscribed in my presence and sworn to before me this 4th day of March, 1909.

(Seal) ED. P. SMITH,
Notary Public.

Endorsed: Filed Mar. 4, 1909. Geo. H. Thummel, Clerk.

24 Thereupon afterwards, to-wit:—On the 5th day of April, 1909, motion was filed in said case, which said motion is in words and figures following, to-wit:

In the Circuit Court of the United States Within and for the District of Nebraska, Omaha Division.

The Updike Grain Company, a corporation, The Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants,

vs.

Union Pacific Railroad Company, Defendant.

Motion.

Comes now the above named defendant, and moves the Court for an order compelling the complainants to set out specifically in their petition, the following, to-wit:

1st. Whether the grain or any portion thereof on which complainants demand elevator allowances of this defendant remained in the elevator for a period longer than ten days; if so, what portion thereof, and how long.

2nd. Whether the grain or any portion thereof on which complainants demand elevator allowances of this defendant was dried, weighed, mixed, blended or graded, or put through any process whatever whereby the grade or value of the grain was enhanced over and above the value thereof at the time it was taken by the complainants from this defendant's cars and placed in their elevators; if so what portion.

25 3rd. Whether the complainants or any of them have at any time received from carriers handling their grain out of the elevators north, east and south, elevation allowances in any sum whatever, on the same grain on which they now claim elevation allowances of this defendant.

UNION PACIFIC RAILROAD COMPANY,
By Edson Rich and _____
Its Attorneys.

Endorsed: Filed Apr. 5, 1909. Geo. H. Thummel, Clerk.

26 Thereupon afterwards, to-wit:—On the 21st day of April, 1909, Answer was filed in said case, which said Answer is in words and figures following, to-wit:—

In the Circuit Court of the United States Within and for the District of Nebraska, Omaha Division.

The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants,
No. 161 vs. Doc. Y.
Union Pacific Railroad Company, Defendant.

Answer.

Comes now the above named defendant and for answer to the petition of the complainants herein says:

1. This defendant admits the allegations as contained in Paragraph 1 of the complainants' petition.

2. This defendant admits the allegations as contained in Paragraph 2 of the complainants' petition.

3. This defendant admits the allegations as contained in Paragraph 3 of the complainants' petition.

4. This defendant admits that during the period in controversy between the parties to this action the American Railway Association, of which Association this defendant was a member, had adopted the rules as alleged in Paragraph 4 of the complainants' petition, but this defendant denies that the said rules governed the handling of cars as between the various members of the said association and the general public, and alleges that the said rules in no way or manner affected the law or custom governing the use of cars in the
27 transportation or handling of freight, as between the various railroad companies and their patrons.

The defendant further alleges that the said rules were merely for the convenience of the various railroads belonging to the said association, and were not drawn with reference to nor intended to apply to business transactions between the said railroad companies and their patrons.

The defendant further alleges that the said rules of the American Railway Association, referred to in the complainants' petition, were not intended to apply to relations between the railroad companies and the shippers, and that the said rules are not required by law to be filed with the Interstate Commerce Commission, and that the relation existing between the railroad companies with reference to the delivery and handling of cars is on an entirely different basis from that governing the handling of cars between the railroad companies and their patrons. For these reasons the said rules have no binding force or effect, either as a matter of law or contract, as between the railroad companies and their shipping patrons, and no application to the controversy herein.

5. This defendant admits the allegations as contained in Paragraph 5 of the complainants' petition.

6. This defendant, for answer to the sixth paragraph of the complainants' petition, admits that the Union Stock Yards Company made and published its rules for the handling of cars when made empty, as in the complainants' petition alleged, and that Exhibit C attached to the said petition is a substantially correct copy thereof, but this defendant denies each and every other allegation in the said sixth paragraph contained. The defendant further alleges that the
28 rules last above referred to were merely for the convenience of the railroads centering at South Omaha, and applied only as between the railroads themselves, and were not of universal application, either in intent or purpose, to the cars delivered to shippers.

7. This defendant admits the allegations in Paragraph 7 of the complainants' petition to the effect that from June 27, 1906, down to the 1st day of January, 1908, the defendant paid to the complainants the elevation allowances provided for in G. F. O. No. 888, and G. F. O. No. 904, where all the requirements and conditions of the said tariffs had been complied with. This defendant denies each and every other allegation in said seventh paragraph contained.

8. This defendant, for answer to the eighth paragraph of the complainants' petition, admits limited grain traffic transactions with the complainant, the Updike Grain Company; admits that such cars as may have been used by the said complainant for shipments of grain from points on this defendant's line of railroad to eastern destinations were furnished for the said complainant's use by this defendant; but for lack of information denies each and every other allegation in the said paragraph contained, and leaves the complainant to its proof.

9. This defendant, for answer to the ninth paragraph of the complainants' petition, admits limited grain traffic transactions with the complainant, the Nebraska-Iowa Grain Company; admits that such cars as may have been used by the said complainant for shipments of grain from points on this defendant's line of railroad to eastern destinations were furnished for the said complainant's use by this defendant; but for lack of information denies each and every other allegation in the said paragraph contained, and
29 leaves the complainant to its proof.

10. This defendant, for answer to the tenth paragraph of the complainants' petition, admits limited grain traffic transactions with the complainant, the Crowell Lumber & Grain Company; admits that such cars as may have been used by the said complainant for shipments of grain from points on this defendant's line of railroad to eastern destinations were furnished for the said complainant's use by this defendant; but for lack of information denies each and every other allegation in the said paragraph contained, and leaves the complainant to its proof.

11. This defendant, for answer to Paragraph 11 of the complainants' petition, admits that it has made payments to the competitors of the complainants for elevator allowances as provided for in its lawfully published tariffs. The defendant denies each and every other allegation in the said paragraph contained.

12. The defendant admits the allegations as contained in Paragraph 12 of the complainants' petition.

13. The defendant denies each and every allegation in the complainants' petition contained, not herein expressly admitted to be true or in some other manner controverted.

14. This defendant, further answering, alleges that the claims of the various complainants in this case, as set out in the petition, are illegal, unjust and unlawful for the following reasons:

For the reason that the grain, if any, so transported and unloaded as in the complainants' petition alleged, was in each instance unloaded and handled through a private elevator owned or controlled by the complainants themselves; that the handling of the said grain through the said elevators was not in the exercise of a public duty but for the purpose of private gain, and that the handling of the said grain through the said private elevators by the three complainants herein, and each of them, was for the purpose of having the said grain weighed, stored, inspected, cleaned, mixed or otherwise treated in the said elevators, for the purpose of adding to the value of the said grain and thereby increasing the private gain of each of the complainants in this suit. And this defendant alleges as a fact that all of the grain transported by this defendant, and unloaded at each of the elevators owned by the several complainants in this cause, was stored, weighed, inspected, cleaned, mixed or otherwise treated, and an additional value thereby added to the said grain, which value accrued wholly and solely to the complainants herein, and the defendant further alleges that the unloading of the said grain by the complainants and each of them in their respective elevators was not for the purpose of releasing the cars in which the same had been transported by the defendant herein, but that the said grain was unloaded in the said elevators by the complainants herein, and each of them, for the purpose of being weighed, stored, inspected, cleaned, mixed, or otherwise treated, for the purpose of adding to the value of the said grain, or for the purpose of holding the said grain for a rise in the market, with the sole object in view of financially benefiting the said complainants, and each of them, in the handling of said grain.

15. This defendant further alleges that the said tariffs, G. F. O. 888 and G. F. O. 904, so published by the Union Pacific Railroad Company, extended to the complainants herein, and each of them, an unlawful, unjust and discriminatory advantage over their competitors in the same district and territory.

16. This defendant further alleges, upon information
31 and belief, that the grain handled by each of the complainants herein, upon which the allowance or elevation charge is claimed, was, in fact, stored and remained in storage in the said elevators, for a period in excess of ten days solely for the pecuniary benefit of each of the complainants herein.

17. The defendant further alleges, on information and belief, that the various amounts claimed by each of the complainants herein have in fact been paid to and allowed to the said complainants by the railroads moving the said grain north, east and south from the various elevators owned by the complainants located in the Cities of Omaha and South Omaha.

Wherefore, this defendant prays that it may be dismissed hence with its own proper costs.

UNION PACIFIC RAILROAD COMPANY,

By N. H. Loomis, F. C. Dillard, and Edson Rich, Its Attorneys.

State of Nebraska,
County of Douglas—ss.

C. J. Lane, being first duly sworn, on his oath deposes and says that he is the First Assistant General Freight Agent of the above named defendant, Union Pacific Railroad Company; that he has read the foregoing answer and knows the contents thereof, and that the statements therein contained are true, as he verily believes.

C. J. LANE.

Subscribed in my presence and sworn to before me this 19 day of April, 1909.

H. E. KELLEY,
(Seal) Notary Public.

Endorsed: Filed Apr. 21, 1909. Geo. H. Thummel, Clerk.

32 Thereupon, afterwards, to-wit: At the April 1909, Term of said Court, and on the 12th day of May. 1909, the following proceedings were had and done in said case, as appears of record in Journal No. 7 of the proceedings of said Court, to-wit:

Updike Grain Company, et al.,
vs.
Union Pacific Railroad Company.

It is ordered that leave be and the same hereby is given to file reply herein instanter.

And now, this cause coming on for trial, plaintiffs appeared by Smyth & Smith, their solicitors, and the defendant appeared by Edson Rich, its solicitor; also came the following named persons as Jurors, to-wit:

H. W. Ludwig,	James R. Pomeroy,	George Smith,
P. J. Langdon,	George Korb,	G. D. Gibson,
Oscar Kayser,	C. E. McManus,	John J. Ryan,
D. A. Becher,	Milo Cleveland,	A. R. Dodson,

who were duly empanelled and sworn according to law, and thereupon the cause came on for hearing on the pleadings and the evidence, and the said jury, having heard the opening statements of counsel, and the testimony adduced in part, and the trial of said cause not being concluded at the hour of adjournment, it is

Ordered, that further proceedings herein be and they hereby are postponed until tomorrow morning at 9:30 o'clock.

33 Thereupon afterwards, to-wit:—On the 12th day of May, 1909, Reply was filed in said case, which said Reply is in words and figures following, to-wit:—

In the Circuit Court of the United States, for the District of Nebraska.

The Updike Grain Company, et al., Plaintiffs,
vs.
The Union Pacific Railroad Company, Defendant.

Reply.

Come now the plaintiffs and for reply to the answer of the defendant herein deny each and every allegation therein contained, and ask judgment as in their petition set forth.

SMYTH & SMITH,
Attorneys for Plaintiffs.

State of Nebraska,
County of Douglas—ss.

Ed. P. Smith, being first duly sworn, deposes and says he is one of the attorneys for the plaintiffs herein; that said plaintiffs and each of them are corporations, and the statements in the foregoing reply are true as he verily believes.

ED. P. SMITH.

Subscribed in my presence and sworn to before me this 11 day of May, 1909.

(Seal) GEO. H. THUMMEL, Clerk.
By John Nicholson, Deputy.

(Endorsed): Filed May 12, 1909. Geo. H. Thummel, Clerk. By John Nicholson, Deputy.

34 Thereupon afterwards, to-wit:—At the April 1909 Term of said Court and on the 13th day of May, 1909, the following proceedings were had and done in said case, as appears of record in Journal No. 7 of the proceedings of said Court, to-wit:

Updike Grain Company, et al.
vs.
Union Pacific Railroad Company.

This day again came the parties herein by their attorneys and also came the Jury heretofore empanelled and sworn, and the trial proceeded. And the said Jury, having heard further testimony, and the trial of said cause not being concluded at the hour of adjournment, it is

Ordered that further proceedings herein be and they are hereby postponed until tomorrow morning at 9:30 o'clock.

35 Thereupon afterwards, to-wit: At the April 1909 Term of said Court, and on the 14th day of May, 1909, the following proceedings were had and done in said case, as appears of record in Journal No. 7 of the proceedings of said Court, to-wit:

Updike Grain Company, et al.,
vs.
Union Pacific Railroad Company.

This day again come the parties herein by their Solicitors, and also come the jury heretofore empanelled and sworn and the trial proceeded. And the said Jury having heard further testimony, do, by direction of the Court, return their verdict in words and figures following, to-wit:

"In the Circuit Court of the United States, for the District of Nebraska.

The Updike Grain Company, et al., Plaintiffs,
161 vs. "Y"
Union Pacific Railroad Company, Defendant.

Verdict of the Jury.

We, the jury, being duly empanelled and sworn to try the issues in this cause, do find for the plaintiffs, and assess their damages as follows:

We find in favor of the Updike Grain Company and assess its damages at Seven Thousand Four Hundred Sixteen and 31-100 Dollars ($7,416.31).

We find in favor of the Nebraska-Iowa Grain Company, and assess its damages at the sum of Two Thousand Seven Hundred Sixty and 71-100 Dollars ($2,760.71).

We find in favor of the Crowell Lumber & Grain Company and assess its damages at the sum of Seven Hundred and Fifty-four 15-100 Dollars ($754.15).

36 May 14 1909. GEORGE SMITH, Foreman."

It is therefore considered, ordered and adjudged that the plaintiff, Updike Grain Company do have and recover of and from the defendant Union Pacific Railroad Company, the sum of Seven Thousand Four Hundred Sixteen and 31-100 Dollars ($7,416.31), and its costs of suit, and that it do have execution therefor.

It is further considered, ordered and adjudged that the plaintiff, Nebraska-Iowa Grain Company do have and recover of and from the defendant, Union Pacific Railroad Company, the sum of Two Thousand Seven Hundred Sixty and 71-100 Dollars ($2,760.71) and its costs of suit, and that it do have execution therefor.

It is futher considered, ordered and adjudged that the plaintiff Crowell Lumber & Grain Company do have and recover of and from the defendant Union Pacific Railroad Company, the sum of Seven Hundred and Fifty-four and 15-100 Dollars ($754.15) and its costs of suit, and that it do have execution therefor.

37 Thereupon afterwards, to-wit: At the April 1909 term of said Court, and on the 17th day of May, 1909, the following proceedings were had and done in said case as appear of record in Journal No. "7" of the proceedings of said Court, to-wit:

Updike Grain Company, et al.
161-Y vs.
Union Pacific Railroad Company.

On application of the defendant, it is ordered that leave be and the same hereby is granted to it to file a petition for new trial, and execution of judgment is stayed for 42 days.

38 Thereupon, afterwards, to-wit: On the 17th day of May, 1909, motion for new trial was filed in said case which said Motion for new Trial is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

The Updike Grain Company, a Corporation, The Nebraska-Iowa Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Complainants.
No. 161 vs. Doc. Y
Union Pacific Railroad Company, Defendant.

Motion for New Trial.

The defendant moves the Court for a new trial of this cause for the following reasons:

1st. The verdict is not sustained by sufficient evidence.

2nd. The verdict is contrary to law.

3rd. Errors of law occurring at the trial, and duly excepted to at the time.

4th. The Court erred in overruling the defendant's objection to the introduction of any evidence on the part of the plaintiffs, on the ground that the petition failed to state a cause of action against the defendant, to which ruling of the Court the defendant at the time duly excepted.

5th. The Court erred in overruling the defendant's motion made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the several plaintiffs, to which ruling of the Court the defendant at the time duly excepted.

39 6th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the Updike Grain Company, to which ruling of the Court the defendant at the time duly excepted.

7th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the Court the defendant at the time duly excepted.

8th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the Court the defendant at the time duly excepted.

9th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the plaintiffs.

10th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Updike Grain Company, to which ruling of the Court the defendant at the time duly excepted.

11th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the Court the defendant at the time duly excepted.

40 12th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the Court the defendant at the time duly excepted.

13th. The Court erred in sustaining the motion made by the plaintiffs, at the close of all the testimony in the case, to direct a verdict in favor of the plaintiffs and against the defendant, to which ruling of the Court the defendant at the time duly excepted.

14th. The Court erred in directing the jury to find a verdict in favor of the Nebraska-Iowa Grain Company for the sum of $2,509.74, with interest from July 22, 1907, to which action of the Court the defendant at the time duly excepted.

15th. The Court erred in directing the jury to find a verdict in favor of the Crowell Lumber & Grain Company for $698.29, with interest from December 26th, 1907, to which action of the Court the defendant at the time duly excepted.

16th. The Court erred in directing the jury to find a verdict in favor of the Updike Grain Company for $6742.10, with interest from July 1st, 1907, to which action of the Court the defendant at the time duly excepted.

17th. The Court separately erred in directing the jury to return a verdict in favor of each of the plaintiffs, the Nebraska-Iowa Grain Company, the Crowell Lumber & Grain Company, and the Updike Grain Company, to which action of the Court the defendant at the time duly excepted.

18th. The Court erred in ordering, rendering and entering judgment in favor of the Nebraska-Iowa Grain Company.

41 19th. The Court erred in ordering, rendering and entering judgment in favor of the Crowell Lumber & Grain Company.

20th. The Court erred in ordering, rendering and entering judgment in favor of the Updike Grain Company.

21st. The Court erred in instructing the jury in the following words:

"I will cut this matter short, and say to you, Gentlemen of the Jury, that the Court will relieve you of responsibility in the matter so that you need not have any compunction of conscience, and will direct you to return a verdict for the Nebraska-Iowa Grain Company in the sum of $2,509.74, with interest from July 22, 1907; and in favor of the Crowell Lumber & Grain Company find a verdict in their favor for $698.29, with interest from December 26th, 1907; and in the case of the Updike Grain Company for $6742.10, with interest from July 1st, 1907."

To the giving of which instruction the defendant duly excepted at the time and in the presence of the jury.

UNION PACIFIC RAILROAD COMPANY,
By N. H. Loomis, Edson Rich,
Its Attorneys.

Endorsed. Filed May 17, 1909. Geo. H. Thummel, Clerk.

42 Thereupon afterwards, to-wit:—On the 5th day of June, 1909, Motion and Notice was filed in said case, which said Motion and Notice is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

The Updike Grain Company, et al., Plaintiffs,
vs.
The Union Pacific Railroad Company, Defendant.

Motion and Notice.

The plaintiffs and each of them move the court to tax as a part of the costs in this case a reasonable attorneys' fee in favor of plaintiffs' attorneys, and ask that the amount thereof be a sum equal to 10 per cent of the amount of the several verdicts and judgments heretofore entered in this case.

SMYTH & SMITH,
Attorneys for Plaintiffs.

Notice.

The defendants will take notice that on Saturday the 5th day of June, 1909, at 9:30 o'clock A. M., or as soon thereafter as we can be heard, we will call up before His Honor, Judge W. H. Munger, the above entitled motion, and will ask that an attorneys' fee be entered in accordance with said motion, in the sum of 10 per cent of the amount of the several judgments entered in said cause.

SMYTH & SMITH,
Attorneys for Plaintiff.

43 Received a copy of the above notice and motion this 1st day of June, 1909.

EDSON RICH,
Attorney for Defendant.

(Endorsed): Filed June 5, 1909. Geo. H. Thummel, Clerk.

44 Thereupon, afterwards, towit: At the April 1909 term of said Court, and on the 5th day of June, 1909, the following proceedings were had and done in said case, as appear of record in Journal No. "7" of said Court, to-wit:

Updike Grain Company, et al.,
161-Y vs.
Union Pacific Railroad Company.

This cause coming on to be heard on the motion of defendant for a new trial, the same is submitted to the Court. After due consideration thereof and being fully advised concerning the same it is

Ordered that said motion for a new trial be and the same hereby is overruled. It is further

Ordered that an attorneys fee in a sum equal to ten per cent of the amount of the several verdicts and judgments heretofore entered herein be and the same hereby is awarded to plaintiffs' attorneys, the same to be taxed as costs in the case.

45 Thereupon afterwards, to-wit:—On the 28th day of June, 1909, Bill of Exceptions was filed in said case, which said Bill of Exceptions is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants.
No. 161 vs. Docket "Y"
The Union Pacific Railroad Company, Defendant.

Bill of Exceptions.

Be It Remembered, That on the 12th day of May, 1909, at the April 1909 Term of the Circuit Court of the United States for the District of Nebraska, Omaha Division, Honorable William H. Munger, Judge, presiding, the above entitled cause was called for trial, and a Jury empanelled therein, and the trial commenced and continued until and including the 14th day of May, 1909; Messrs. C. J. Smyth and Ed. P. Smith appearing for the plaintiffs; and Edson Rich, Esq., appearing for the defendant; at which said trial the plaintiffs and defendant, each respectively, introduced and offered evidence, both oral and documentary, as hereinafter set forth; and objections were made thereto, rulings had on such objections, and exceptions taken to said rulings as follows:

46 Mr. Smith:

Plaintiff offers in evidence, a portion of the document which the reporter has marked Plaintiffs' Exhibit 1, being a certified copy of the report and order of the Interstate Commerce Commission, in the proceedings had before them in the cases of the Nebraska-Iowa Grain Company, No. 1628; Crowell Lumber & Grain Company vs. Same, No. 1642, and Updike Grain Company, v. same, No. 1655.

Mr. Rich:

The defendant objects to the introduction of any testimony in this case, for the reason that the petition fails to state a cause of action in favor of any one of the three plaintiffs as against this defendant.

Objection overruled. To which ruling of the Court the defendant excepts.

Mr. Rich:

The defendant further objects to the offer as being indefinite.

The Court:

Well, the parts that relate to other companies would be wholly immaterial, but, Mr. Smith, you may point out the parts that you want to introduce.

Mr. Smith:

We offer in evidence that part of plaintiffs' exhibit 1, being finding of fact and the order of the Interstate Commerce Commission in the matter referred to in the petition, begin-

ning on page 102 thereof, with the words, "We find in case No. 1628," and thence down to and including the certificate of the Secretary of the Commission, with the exception of that part on page 103 which refers to the Nye-Schneider-Fowler Grain Company, and with the exception of that part beginning on page 105, which refers to the Cavers
47 Elevator Company, and also with the exception of that part of the order which refers to the Nye-Schneider-Fowler Company and to the Cavers Company.

Mr. Rich:
Defendant objects to this as incompetent, irrelevant and immaterial.

Objection overruled, the portions above specified of Exhibit 1, are received in evidence and read to the Court and Jury by Counsel for plaintiffs.

To all of which defendant excepts.

The portions of said plaintiffs' exhibit 1, which were received in evidence and read to the jury are as follows:

48 Plaintiffs' Exhibit 1.

"We find in case No. 1628, Nebraska-Iowa Grain Company v. Union Pacific Railway Company:

That the complainant between July 2, 1906, and July 22, 1907, unloaded at its elevator 183 carloads of grain, containing in the aggregate 12,104,900 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that upon 11,898,260 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $1,487.28; that upon 206,640 pounds the allowance was at the time of its unloading ¾ cent per 100 pounds, or $15.50, making a total of $1,502.78.

That the said complainant between said dates unloaded 14 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific; that such cars contained in the aggregate 877,820 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $109.73.

That the said complainant between said dates unloaded 110 cars belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific Company more than forty-eight hours from the time they were received from that company; that the contents of these cars aggregated 7,722,040

pounds; that upon 6,961,500 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $970.19; that upon 360,540 pounds the allowance at the time of its unloading was ¾ cent per 100 pounds, or $27.04, making a total of $987.23.

That the said complainant did not unload any cars belonging to foreign roads having no direct connection within the switching territory.

49 We therefore find that the complainant Nebraska-Iowa Grain Company is entitled to recover of the defendant the sum of $2,509.74 with interest at 6 per cent from July 22, 1907.

# # # # # # #

"We find in case No. 1642, Crowell Lumber and Grain Company, v. The Union Pacific Railroad Company:

That the complainant between August 10, 1906, and Decem- 26, 1907, unloaded at its elevator 33 carloads of grain, containing in the aggregate 2,004,930 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that upon 1,904,380 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, amounting to $238.17, and upon 99,550 of this amount the tariff allowance at the time it was unloaded was ¾ cent per 100 pounds, amounting to $7.40, making a total of $245.57.

That the said complainant between said dates unloaded 8 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific; that such cars contained in the aggregate 532,310 pounds of grain; that the elevation allowance at the time it was unloaded was 1¼ cent per 100 pounds, amounting to $66.54.

That the complainant between said dates unloaded at its elevator 58 cars belonging to foreign roads or to the Union Pacific Company, containing in the aggregate 3,669,340 pounds, which were returned to the Union Pacific more than forty-eight hours from the time they were received from that company. Of this amount 2,199,550 pounds was on a tariff allowance of 1¼ cents per 100 pounds at the time it was
50 unloaded or $274.94 and that upon 1,469,790 pounds the allowance was, at the time of the unloading ¾ cent per 100 pounds or $110.24, making a total of $395.18.

That the said complainant did not unload any cars belonging to foreign roads having no direct connection within the switching territory.

We, therefore, find that the complainant, Crowell Lumber & Grain Company, is entitled to recover of the defendant the sum of $698.29 with interest at the rate of 6 per cent from December 26, 1907.

We find in case No. 1655, Updike Grain Company v. Union Pacific Railroad Company:

That the complainant between July 1, 1906, and July 1, 1907, unloaded at its elevator 103 carloads of grain, containing in the aggregate 6,457,140 pounds, where the cars were returned to the Union Pacific within forty-eight hours, and upon this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds or $807.14.

That the said complainant between said dates unloaded 313 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific Company; that such cars contained in the aggreate 20,585,820 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $2,573.32.

That the said complainant between said dates unloaded 355 cars belonging to foreign roads having no direct
51 connection within the switching territory and which were never returned to the Union Pacific Company. That the aggregate contents of said cars were 23,436,960 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading amounted to $2,929.62.

That the said complainant between said dates unloaded 54 cars belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific Company more than forty-eight hours from the time they were received from that company. The contents of these cars aggregated 3,456,230 pound of grain, and the elevation allowance, according to the tariff rates at the time of the unloading, at 1¼ cents per 100 pounds, amounted to $432.02.

We find, therefore, that the complainant Updike Grain Company is entitled to recover of the defendant the sum of $6,742.10 with interest at 6 per cent from July 1, 1907."

Order.

At a General Session of the Interstate Commerce Commission, held at its office in Washington D. C., on the 6th day of January, A. D. 1909.

Present:

Martin A. Knapp,	:	
Judson C. Clements,	:	
Charles A. Prouty,	:	
Francis M. Cockrell,	:	Commissioners.
Franklin K. Lane,	:	
Edgar E. Clark,	:	
James S. Harlan.	:	

52 No. 1628

Nebraska-Iowa Grain Company.
v.
Union Pacific Railroad Company

No. 1642

Crowell Lumber & Grain Company
v.
same

No. 1655

Updike Grain Company
v.
same.

# # # # # # #

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties and full investigation of the matters and things involved having been had, and the Commission, having, on the date hereof, made and filed a report containing its conclusions thereon:

It is Ordered, That defendant Union Pacific Railroad Company be, and it is hereby, authorized and directed on or before the 1st day of March, 1909, to pay unto the complainant in case No. 1628, the Nebraska-Iowa Grain Company, the sum of $2,509.74, with interest thereon at the rate of 6 per cent per annum from July 22, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said com-

plainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order."

# # # # # # #

53 "It is further ordered, that defendant Union Pacific Railroad Company be, and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the complainant, in case No. 1462, the Crowell, Lumber & Grain Company, the sum of $698.29, with interest thereon at the rate of 6 per cent per annum from December 26, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order.

It is further ordered, that defendant, Union Pacific Railroad Company be and it is hereby authorized and directed, on or before the 1st day of March, 1909, to pay unto the the complainant in case No. 1655 the Updike Grain Company, the sum of $6,742.10, with interest thereon at the rate of 6 per cent per annum from July 1, 1907, as reparation for undue discrimination by denying elevator allowance on certain shipments of grain, which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made a part of this order."

# # # # # # #

"I, Edward A. Moseley, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commis-
54 sion are true copies of the originals now on file in the office of this Commission.

In testimony whereof, I have hereunto subscribed my name and affixed the
(Seal) seal of the Commission, this 23rd day of January, 1909.

EDW. A. MOSELEY,
Secretary."

55 William H. Anderson is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed. P. Smith, he testified as follows:

Q. What is your business?
A. Auditor Freight Accounts, Union Pacific.
Q. How long have you occupied that position?
A. About 3 years.
Q. Were you Auditor for the Union Pacific in the years 1906 and 1907? A. Yes sir.
Q. What, if anything, did your department, or did you, have to do with the checking up, auditing and paying of the claims that were presented by different elevator companies for elevation allowance during that time?
A. We checked and verified the claims to see that they were in accordance with the tariffs.
Q. What did you do in the way of making out vouchers for their payment?
A. We drew vouchers then for the amount.
Q. State to the jury whether or not any of the claims of any of the elevator companies for the elevation of grain were paid in the years 1906 and 1907.

Mr. Rich:
That is objected to as immaterial, irrelevant and incompetent.

The Court:
On those grounds the objection will be overruled; it might be well to confine your question to those that you allege in the petition.

Q. You may tell the Court and Jury whether or not during the years 1906 and 1907, any claims of the Omaha Ele-
56 vator Company or the Trans-Mississippi Grain Company for elevation allowance were paid by your department?

Mr. Rich:
That is objected to as incompetent, irrelevant, immaterial, no foundation laid.

Objection overruled. Defendant excepts.

A. I do not do any more than draw the vouchers.
Q. Well, did you draw the vouchers for them?

Mr. Rich:
Defendant objects for the reason that it is incompetent, irrelevant, immaterial, no proper foundation laid, and not the best evidence.

Objection overruled. Defendant excepts.

A. I have drawn vouchers, yes sir.

Q. Have you with you the record showing what claims for elevation allowance on behalf of the Omaha Elevator Company and the Trans-Mississippi Company were presented to your department for auditing and verification in the years 1906 and 1907?

A. I have a memorandum, yes, sir.

Q. I believe the subpoena required you to bring the records.

A. I could not get the records out in the time I had, but I brought a memorandum.

Q. Tell the jury, if you can, what claims on behalf of the Omaha Elevator Company and Trans-Mississippi Grain Company for elevation allowance were audited and vouchers drawn for them in your department in the years 1906 and 1907?

Mr. Rich:

That is objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. (No response)

57 Q. What is this record, which you have, Mr. Anderson?

A. This is a list of the claims as presented, just showing the vouchers, the date, their number, and the amount of the voucher, and our voucher references, and the tracing of the claims through the offices.

Q. That begins with what date?

A. That begins with August, 1906.

Q. And extends to what time?

A. Those claims on the latter part are not paid. It extends down to the time of the order of the Commission not to pay them. There are a lot here that have been presented right along, but—

Q. Have you made a computation of the amount which that shows was paid to the Omaha Elevator Company?

A. $10,315.93.

Q. And that extends from what date to what date?

A. That extends from August 1906 to February 11, 1907, I believe. I wouldn't want to be positive on this, this is merely a memorandum, you know.

Q. As shown by this memorandum were vouchers issued to them on claims subsequently filed?

A. Well, now I can't tell you that. I only had checked down to where—

Q. You don't know whether vouchers were issued on the subsequent claims or not?

A. No, I don't know; I haven't had time to verify them yet.

Q. You are able to state that from August 17th, 1906, down to February, 1907, there was paid to them $10,315.18? (93?)

A. Yes sir, that is, there were vouchers drawn.

58 Q. Subsequent to that time you are not able to say whether vouchers were drawn or not?

A. No, I am not.

Q. Have you with you any record or memorandum showing the amount during this period of time that was paid to the Trans-Mississippi Grain Company?

A. Yes sir, I have.

Q. Running from what date to what date?

A. This runs from 1907.

Q. Well, have you anything there showing what was paid to the Trans-Mississippi Grain Company in the year 1906.

A. Not separate, no sir. I have nothing here which shows what was paid in 1906.

Q. Do you know whether or not anything was paid to them in 1906?

A. I can't say positively without looking up the records. I just got this subpoena at ten minutes to 12.

Q. Well, will you make a search for the 1906 record and bring that too?

A. Yes, we are doing that now. It will take us—you see, these records are all filed, but sometime tomorrow morning I can bring it.

Q. Now, during that period of time, how were those different claims checked up or verified by your department?

A. They were checked with the way bills to see that the movement was made—grain actually moved; they were checked with the report furnished by the agent to determine that the grain moved to the elevator, and that it was returned within the time—that is, that the cars were returned within the time limit provided by the tariff.

59 Q. The Trans-Mississippi Elevator Company and the Omaha Elevator Company operate terminal elevators, and did during that time?

A. They operate elevators, yes sir.

Q. Where are they located? A. At Council Bluffs.

Q. Upon whose tracks? A. Union Pacific tracks.

Q. Have you ever been at those elevators?

A. I have been in the vicinity.

Q. They are Union Pacific switch tracks leading up to the elevators, are they not?

A. Yes sir.

Q. So that the cars that are to be placed at the Omaha Elevator Company's elevator, or at the elevator of the Trans-Mississippi Grain Company for unloading, do not at any time, get off of the Union Pacific tracks, do they?

A. I understand they do not, no sir.

Q. Does that statement you have, show the ownership of the cars on which elevation allowance is paid?

A. This statement here does not show that, no.

Q. Do the records in your office show on what particular cars this elevation is allowed?

A. Yes sir.

Q. And that will show whether it was paid on Union Pacific cars or on foreign cars?

A. Yes sir.

Q. Now, possibly we can reach this without requiring you to bring in those records. Can you tell the Court and jury whether or not during all that time when you were paying this
60 allowance to the Omaha Elevator Company or to the Trans-Mississippi, did you pay it merely on Union Pacific cars that were unloaded, or did you pay it on foreign cars as well?

A. Paid it on all cars that were unloaded during that time.

Q. If it was a Burlington or a Northwestern car, it was paid just the same?

A. Yes sir.

Q. Or a Baltimore & Ohio car? A. Yes sir.

Q. The ownership of the car, whether it was Union Pacific or whether owned by a foreign road, cut no figure?

A. Cut no figure, no sir.

Q. How did you ascertain whether or not the grain moved to points east of Council Bluffs?

A. That was certified to by the representative of the Western Railway Weighing Association Inspection Bureau—rather the Transit Inspection Bureau.

Q. Who is that agent? A. Mr. Fisher.

Q. He is not a Union Pacific Railroad Company employee?

A. No sir.

Q. The claims when made up by the Omaha Elevator Company or the Trans-Mississippi Grain Company—were they made upon forms or blanks submitted or approved and furnished by the Union Pacific?

A. The first claims were made on forms furnished by themselves, but the forms were inadequate for the information necessary, and the Union Pacific later furnished the forms.

61 Q. Did Mr. Fisher certify on these forms the movement of the grain east?

A. He certified that it moved out—

Mr. Rich: That is objected to as not the best evidence.

The Court: I suppose the documents are the best evidence.

Q. The subpoena called for those claims that were filed' you didn't bring them, did you?
A. They are getting them out now.
Q. Now, Mr. Anderson, during the year 1906 and 1907 were claims filed in your Department by the Nebraska-Iowa Grain Company, the Crowell Lumber and Grain Company and the Updike Grain Company for elevation allowance?
A. Yes sir.
Q. Were those claims submitted on blanks furnished by the Union Pacific?
A. I think most of them were, or amended later and made on the blanks.
Q. Do you remember, whether or not, those, or any of them were certified to by Mr. Fisher, the agent of the—
A. It is my recollection that they were.
Q. Have you a record showing what ones of those claims were paid during that time?
A. Well, there were none of them declined that were in accordance with the tariff.
Q. Were any of them paid?
A. Not that I know of.
Q. You have no recollection of any of them being paid, have you?
A. No sir, I have not.
Q. Have you those claims in your possession, or were they returned to the parties?
62 A. I believe they were all returned for correction.
Q. Now, you will furnish us, will you, either the original books, or a statement, I will be satisfied with a copy, or a statement, if Mr. Rich will be, showing the amount of elevation allowance paid to the Omaha Elevator Company and to the Trans-Mississippi Grain Company, between the 26th day of June, 1906, and the 31st day of December, 1907, inclusive?
A. Yes sir.
Q. Paid to the Omaha Elevator Company and Trans-Mississippi Grain Company?
A. Yes sir.
Q. Have you a record in your office of any claims, that were presented by the Omaha Elevator Company or Trans-Mississippi Grain Company during that period of time, and which claims were disallowed?
A. Yes sir, I have, that is claims that there were cars cut out of for some reason.

Q. Will the statement you prepared show that?
A. I can prepare such a statement.
Q. All right, let us have that in the statement you are to furnish us tomorrow, if you please? What I want is, the amount rather than the detailed statement?
A. I think we can have that here by morning.
Q. I want the amount paid to the Omaha and to the Trans-Mississippi Grain Company during those two years.

63 The Court: You want it between those two different dates?

Mr. Smith: Yes, between June 1906, and the 31st day of December, 1907, inclusive, and I would like the statement to show the number of cars that you disallowed during that period of time. That is all I care to ask this witness at the present time.

Cross Examination, waived at the present time.

Witness temporarily excused.

64 Charles F. Davis, is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed. P. Smith, he testified as follows:

Q. What is your full name? A. Charles F. Davis.
Q. What is your business? A. Grain business.
Q. With what company are you connected?
A. With the Nebraska-Iowa Grain Company.
Q. In what capacity? A. Secretary and Manager.
Q. How long have you been connected with that Company?
A. Four years.
Q. What is the business of the Nebraska-Iowa Grain Company?
A. The buying, selling, shipping and handling of grain.
Q. Has it an elevator in Omaha? A. Yes sir.
Q. Where? A. In the south part of Omaha at a little station called Gibson on the Burlington tracks.
Q. Does it operate any elevators out in the country?
A. Yes, 15 in all.
Q. Does it operate any elevators out in the State on the line of the Union Pacific? A. No sir.
Q. Do you buy grain other than at your country stations?
A. Yes sir, we buy grain from other country elevator men.
65 Q. You buy here on the market in the Omaha Grain Exchange?
A. Buy on the open Omaha market as well.

Q. During the years 1906 and 1907 were you purchasing grain in carload lots? A. Yes sir.

Q. During that period of time did you purchase any grain in carload lots that came in off of the Union Pacific?

A. We did.

Q. Are you familiar with the method of handling the cars and do you know the procedure by which, when cars come in off of the Union Pacific, they finally reach your elevator?

A. Fairly so, yes sir.

Q. And you were so familiar during the years 1906 and 1907? A. Yes sir.

Q. If you purchase a carload of grain on the open market, here in the Omaha Grain Exchange, tell the Court and Jury the movement and procedure by which that car reaches your elevator, if it is a car that arrived over the Union Pacific?

A. Having purchased a Union Pacific car, the man from whom we buy it delivers to our office very soon after the trade, the bill of lading for that car. That bill of lading is entered upon our records, and immediately forwarded to J. J. Sherlock, Local Agent of the Union Pacific, with an order to deliver that car to the Burlington road for delivery to the Gibson elevator.

Q. When a car arrives here at Omaha, that has been brought into this city over the Union Pacific, we will say from Columbus, where is it placed by the Union Pacific?

A. Upon what is known as the Inspection track.

Q. What do you mean by that?

66 A. It is a track agreed upon by the Inspection department of the Omaha Grain Exchange and the Union Pacific road; a track set apart for the convenience of the inspectors.

Q. Who are those inspectors? A. They are the hired inspectors of the Omaha Grain Exchange.

Q. To test the quality of the Grain?

A. To test the quality of the grain.

Q. And to say whether it is No. 2 wheat, No. 3 wheat and so on? A. Yes sir.

Q. Now, after you have sent this bill of lading and order to Mr. Sherlock, that you have just testified about, what is the next movement of the car?

A. The car is then delivered to a transfer track or a joint track where cars are transferred from the Union Pacific to the Burlington road, and vice versa.

Q. Who moves that car from the inspection track to the transfer track? A. The Union Pacific switching department.

Q. After the car has been placed on the transfer track, what is then done with it?

A. The Burlington switching department then takes it up and delivers it to our elevator in the Burlington yards at Gibson.

Q. Do you know where this inspection track is, of the Union Pacific, on which it places those cars?

A. I know about where it is, yes sir.

Q. About where is it? A. Well, it is near the river and north of the street car bridge at Douglas street.

Q. Down on the bottoms?

67 A. Yes sir.

Q. Do you know where this transfer track is, on which the Union Pacific places it, and from which the Burlington takes it, to your place?

A. I don't know exactly where it is, but it is somewhere in the southeast part of town.

Q. How far is that from Gibson?

A. About one mile I should say—possibly a mile and a half.

Q. Now, when a car is taken off of this transfer track by the Burlington, what is then done with it?

A. It is then delivered to our elevator at Gibson.

Q. Now, in 1906 and 1907, what is the fact as to whether a charge was made for moving a car from the inspection track to the transfer track?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. There was a charge of $2.00 made by the Union Pacific.

Q. What is the fact as to whether or not there was a charge made for moving the car from the transfer track to your elevator?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. There was a charge of $2.00 additional made for the Burlington service.

Q. So the total charge of moving the car from the inspection track to your elevator and back and so on, was $4.00, was it?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

68 The Court: What is the object of this?

Mr. Smith: I want to show that the Union Pacific charged and collected for that entire service, and my contention is, that it is all a Union Pacific movement all the way.

The Court: Go on.

Defendant excepts.

(No response to the question.)

Q. Mr. Davis, are bills rendered to your Company for this service?
A. Yes sir.
Q. By whom? A. By the Union Pacific.
Q. Have you with you in your possession here, in Court, a bill indicating and showing the kind and character of bills that are rendered on each and all of those cars for that movement?
A. I have.
Q. Will you let me take it, please?

(Witness hands paper to Counsel.)

Q. You may look at these two papers which have been marked plaintiffs' exhibits 2 and 3, and tell us whether or not those are the originals?
A. Those are the originals, yes sir.
Q. Given to you by whom?
A. By the Union Pacific.
Q. At or about the time they bear date? A. Yes sir.
Q. Do those both refer to one and the same car?
A. Yes sir.
69 Q. Can you tell the jury what the movement of that car was?
A. That car was set on the inspection track, and this first bill is the $2.00 charge for the Union Pacific switching service, switching that car from the inspection track to the transfer track of the Burlington.

Mr. Rich: I move to strike out the answer as not the best evidence.

Mr. Smith: Well, I think myself that is so.

Q. I didn't ask you to tell what they are, I asked you what the movement of the car was.
A. The car was moved from the inspection track to the Gibson elevator.
Q. By the way of the—It went from the inspection track to the transfer track, and then to the Gibson elevator?
A. Yes sir, it did.

Mr. Smith: We offer in evidence plaintiffs' exhibits 2 and 3.

Mr. Rich: I would like to ask the witness a question or two.

Cross-Examination
(as to Exhibits 2 and 3.)

Q. I call your attention to plaintiffs' exhibit 2, and you may state whether that represents the movement of a car that you bought on the Omaha market, or whether that is a car of grain that came from west of Gilmore, over the Union Pacific, consigned to you, originally?

A. I had a record pinned to that which came from my office, which record stated that we bought the car from E. E. Huntley on the Omaha Grain Exchange.

70 Q. In case of a car coming from west of Gilmore, consigned directly to you, would there be any charge for handling that or re-consigning it by the Union Pacific?

Mr. Smith:
That is objected to as not proper cross examination, it may be cross examination later on, but it is not now.

The Court: Yes, I think that is so.

Defendant excepts.

Q. Where did you receive this plaintiffs' exhibit 3 from?
A. From the Union Pacific freight collector.
Q. In connection with exhibit 2?
A. Possibly in connection—possibly at a later date.

Mr. Rich:
We now object to the introduction in evidence of plaintiffs' exhibits 2 and 3, for the reason that the same are incompetent, irrelevant and immaterial.

The Court:
Did that relate to some one of the cars involved in this controversy?

Mr. Smith:
I think not. It is simply for the purpose of showing the manner in which the business is done?

The Court:
I think the objection to these exhibits should be sustained. The witness seems to be able to testify how the business is done. He says it is switched onto the inspection track, and from there moved by the Union Pacific to the transfer track, and from there the Burlington takes it down to Gibson to his elevator.

Plaintiffs except.

71 Direct Examination Resumed.

By Mr. Smith.

Q. Mr. Davis, can you procure the corresponding papers covering a shipment that occurred during the time in controversy here?

A. It is possible that I cannot, as we put in these original switching bills with the claims. When cars moved out, the road taking the shipment out, will refund to us switching money that we paid on those slips, and any of those used in 1906 and 1907 have been surrendered with claims.

Q. And during the year 1906 and 1907, did you pay the Burlington anything for any of this switching service?

Mr. Rich:

That is objected to as incompetent, irrelevant and immaterial.

The Court:

That is an indirect way. You may show, if you desire that the switching charges were all paid to the defendant, if you want to.

Mr. Smith:

I want to show that all these charges were paid to the Union Pacific.

Q. What is the fact in that regard, Mr. Davis?

Mr. Rich:

That is objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. All switching charges for the moving of cars from the Union Pacific to our elevator are paid to the Union Pacific—none to the Burlington.

Q. When a car was moved from the transfer track to your elevator, and afterwards returned to the transfer track, the entire switching charge as such, is paid to the Union Pacific?

72 Mr. Rich:

That is objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. It is.

Q. Grain that you purchased there on the exchange, or by sending out bids to dealers, or elevator men along the line of the Union Pacific, is that grain inspected?

A. It is.

Q. Explain to the jury what you mean when you say buy grain "Omaha Terms?"

A. To be settled for on weights obtained by the Omaha Grain Exchange.

Q. How about the inspection of it?

A. And upon a grade certified to by the Omaha Grain Exchange.

Q. What is the Omaha Grain Exchange?

A. An incorporated body for the purpose of handling matters of that kind.

Q. Your company does not do the inspection or the grading?

A. No sir.

Q. It is done by a disinterested party? A. Yes sir.

Q. Then grain that is purchased Omaha Terms, how are the weights ascertained?

A. By unloading the grain and weighing it.

Q. Under whose supervision is it weighed?

A. Under the supervision of the paid weigh master of the Omaha Grain Exchange.

Q. Has your company anything to do with the inspection and weighing of the grain that is bought that way?

73 A. Absolutely none.

Q. If you purchase grain then from a dealer on the line of the Union Pacific, or purchase it from any one here on the Grain Exchange, who has bought it in from any place along the line of the Union Pacific, and that grain is unloaded, weighed and inspected here in Omaha, tell the jury on what do you pay for that grain?

A. Upon the official weight certificates issued by the Omaha Grain Exchange.

Q. If you sell grain to dealers east or south, if you sell it on Omaha terms, how is the weight and grade of that ascertained?

A. By the weigh master of the Omaha Grain Exchange in the same method.

Q. So your Company has nothing to do with the weighing and inspection in either event? A. No sir.

Q. Where is it weighed?

A. At the elevator where it is unloaded.

Q. The Omaha Grain Exchange has a man located down there? A. At each elevator, yes sir.

Q. Where does the Union Pacific ascertain the weight of the car on which to charge their freight?

A. That is also based on the weight certificate issued by the Omaha Grain Exchange.

Q. Does the Union Pacific weigh that independently to fix their freight charge?

A. I don't know whether they weigh them or not, but the freight charge is based on the Omaha Grain Exchange weight certificate.

Q. Have you any knowledge of the car and contents being weighed before it reaches your elevator, and the empty
74 car being weighed afterwards by the Union Pacific?

A. Not that I know of.

Q. How is the Grain weighed?

A. The grain coming into the house, the car and the load of grain are weighed on the track scales, the grain is taken out and the empty car is weighed back as the tare.

Q. Does the Union Pacific have a man there to ascertain the weight? A. I think not.

Q. It gets its figures from the Grain Exchange certificate?

A. Yes sir.

Q. What is the capacity of your elevator?

A. About one hundred to one hundred and ten thousand bushels rated at 125,000 bushels.

Q. Now, during the years 1906 and 1907, did you purchase cars of grain that came in off of the Union Pacific?

A. We did.

Q. Were they received at your transfer elevator?

A. Yes sir.

Q. And the cars there unloaded? A. Yes sir.

Q. Do you know, Mr. Davis, about what was the usual and customary time required for the Union Pacific to move a car from the inspection track to the transfer track?

Mr. Rich: That is objected to—

The Court:

Where is that material—I understood that Mr. Rich stated in his opening statement that the 48 hours did not commence to run until they had delivered it on the transfer track.

75 Mr. Smith:

That is true, but here's a movement made entirely by the Union Pacific. I think evidence to show the time they take to make that movement is competent, to show the time it reasonably should take to make the other movement.

Objection sustained. Plaintiffs except.

At this time a recess of five minutes was taken, after which recess the witness Davis resumed the stand, and his direct examination by Mr. Smith was proceeded with as follows:

Q. Mr. Davis, in case of a loaded car coming in over the Union Pacific, and first placed by it on the inspection track, and afterwards moved by it to the transfer track, what order or notice, if any, does your Company give to the Burlington respecting the movement of that car to your elevator?

Mr. Rich: That is objected to as immaterial.

Objection overruled. Defendant excepts.

A. We give no instructions or notice to the Burlington.

Q. Do you know about what is the number of cars that you can handle in a day of ten hours at your elevator—how many cars can you unload?

Mr. Rich: That is objected to as immaterial.

The Court: Where is that material?

Mr. Smith:

That is a preliminary question leading up to the question of how long it takes to get a car down there and unload it. How long it is detained at their elevator to unload it.

76 Mr. Rich: Well, we object to that as immaterial.

Objection overruled. Defendant excepts.

A. About 20 cars.

Q. What is the usual and ordinary time that intervenes between the time that loaded cars are placed on the side track, adjacent to your elevator, and the time that they are unloaded and turned back empty?

A. Not more than 10 hours would elapse.

Q. Well, what would you say was the minimum time, you have given us the maximum?

A. The first car in the string would be unloaded in 20 or 30 minutes, and then each car alternately—the capacity of the track is about 16 cars. We could unload all the cars that the track would hold—

Q. Who has charge of the unloading of cars at your elevator?

A. Mr. Poole is our superintendent.

Q. Do you know about what is the ordinary, reasonable and usual time of moving a car of grain from the transfer track to your elevator, unloading it and turning it back to the switching line as an empty car, and then have that line pick it up and return it to the transfer track?

Mr. Rich: Answer that yes or no.

A. Yes sir.

Mr. Rich: I would like to ask the witness a question or two.

77 Cross Examination

(as to witness's competency to testify as to ordinary, reasonable and usual time, etc.)

By Mr. Rich:

Q. How do you know?

A. Particularly by reason of recent investigation as to the movement on Union Pacific tracks upon which we claim elevation.

Q. You say a recent investigation? A. Yes sir.

Q. Do you know anything about it during the period of time covered by your claims?

A. I did, because I investigated all the Union Pacific cars handled during that period.

Direct Examination Resumed.

By Mr. Smith:

Q. What is the reasonable time for that movement?

Mr. Rich:

That is objected to as incompetent, irrelevant and immaterial and no proper foundation laid for this witness to testify as an expert.

The Court:

I think that objection should be sustained on another ground as yet. If you show some reason why they cannot be delivered within that time then perhaps—if it is material at all, it is because you did not return them within 48 hours, as you want to give some good reason for it.

Mr. Smith:

I have shown the time it takes us, to unload a car and turn it back to the switching line. Now, I want to
78 show what is the reasonable time for the switching line to do all it has to do.

The Court:

I think the objection should be sustained at present.

Plaintiffs except.

Q. Are you personally familiar with the movement of the cars that come in over the Union Pacific and that are placed at your elevator, and the length of time they remain there before being unloaded by your company—are you personally familiar with that or would some one at the elevator be more familiar with it?

A. Mr. Poole, our superintendent could tell you more about that.

Q. During the years 1906 and 1907 did your company through you file any claims with the Union Pacific for the elevation amounts provided for in tariffs 888 and 904?

A. We did.

Q. Have any of those claims been paid? A. No sir.

Q. Do you know the form on which those were gotten up?

A. Yes sir.

Q. By whom were they furnished your company?

A. By the Union Pacific.

Q. Do you know Mr. Fisher? A. Yes sir.

Q. What position did he occupy at that time?

A. He is Transit Inspection Bureau Agent.

Q. Do you know personally whether or not those claims that were presented to the Union Pacific, were on grain that had come in off the line of the Union Pacific?

79 A. Yes sir, it was.

Q. Were those claims on cars that had been unloaded and transferred by your elevator? A. They were.

Q. Did the grain out of those cars afterwards move to points east? A. It did.

Q. Did you obtain the certificate of Mr. Fisher to those claims before they were presented? A. No sir.

Q. When was that obtained?

A. Those claims were referred back to Mr. Fisher's office by the Union Pacific.

Q. Do you know whether Mr. Fisher afterwards certified to them. A. He did.

Q. He certifies to the movement of the grain, does he?

A. Yes sir.

Q. Certifies to the point of origin and that it goes east?

A. Yes, sir.

Q. Were any of those claims paid after that? A. No sir.

Q. Did you have any talk with Mr. Anderson, the Freight Claim Auditor with respect to their payment?

A. Why, Mr. Wright is our Freight claim man.

Q. Did you personally have any talk with Mr. Anderson?

A. I did, on one occasion.

Q. I am not asking now what Mr. Anderson said about it, other than this: Was payment refused because of the form of the claim, or anything of that kind?

A. No sir.

80 Q. Not because it was not gotten up in proper shape?

A. No sir.

Q. Then has your Company ever received from the Union Pacific any pay for the transfer and elevation of any grain that came in over the Union Pacific during the years 1906 and

1907 and which was transferred at your elevator in South Omaha? (Gibson)

A. No sir.

Q. Never have paid any? A. No sir.

Q. You are competitors in this market with the other elevator men? A. Yes, sir.

Q. Do you buy grain out in the state at the same points and from the same people or bid at the same points and to the same people that the Trans-Mississippi people do?

A. We do.

Q. And you were doing so in the years 1906 and 1907?

A. We were.

Q. How is the grain that comes in off of the Union Pacific purchased by you, in what different manner, how do you get in touch with the man who has the grain to sell?

A. In two ways. One is by card bids sent out to the country elevator men, and the other is the grain we purchase in the open market on the Omaha Grain Exchange.

Q. Those card bids are sent out to whom—to practically all elevator men in Nebraska? A. Yes sir.

Q. You send those out every day? A. Yes sir.

81 Q. Bidding them so much on grain of different kinds?

A. Almost every day.

Q. And what is the other method by which you purchase?

A. In the market on the Omaha Grain Exchange.

Cross Examination.

By Mr. Rich:

Q. You say you can unload about 20 cars a day at your elevator?

A. Yes sir.

Q. How do you unload a car?

A. With shovels operated by electric power.

Q. How long does it take you to unload a car?

A. We have unloaded a car in 12 minutes.

Q. What is your average time for unloading a car?

A. About 30 or 40 minutes.

Q. Why do you take 30 to 40 minutes when you can unload in 12?

A. I presume the shovel men get tired working at their top speed. It is pretty heavy work on the operators of the shovels.

Q. Just explain how that is done—the jury may have seen this, but I never have.

A. The cars are run up to the inside of the shed, to the elevator, and are weighed; they stand on the track scales and the weight is taken of the entire car and contents. The doors are pried open and the grain runs out into a vat or pit at the side of the car. That is on an incline and runs the grain

inside the elevator, where the cups of the elevator belt pick it up, and then those big shovels that are about two feet or two and a half feet across, have a handle at the end—They
82 are in appearance a little bit like an ordinary road scraper that is operated with a team. There is a bail that is hitched to the sides of the shovel and there are two of those shovels used in each car, and it takes a good husky man to hold one. The man then pulls the shovel back into the car and the operator—well, it is done automatically, when he pulls the shovel back to a certain point, the rope that is attached to the shovel rolls up on a drum and that pulls the shovel forward with the man holding the top end or the handle of the shovel, and that brings a big bunch of grain out of the door and down into the boot.

Q. How much will one of those shovels take out at each movement?

A. That is a little hard to say. When the grain is high in the car, it is not just what the shovel will hold, but it is what it will bring along by force—brings a great swath of grain out of the door.

Q. What will the shovel itself hold?

A. The shovel is just a flat board.

Q. Are there any other devices than that in common use for unloading the grain?

A. None that I know of—none in use at our elevator.

Q. At any other elevator of any of your competitors?

A. Not that I know of.

Q. Do you know how the Updikes unload their cars?

A. Never have been to the Updike elevators.

Q. Do you know how the Trans-Mississippi and the Peavey Companies unload?

A. I have been to the Omaha elevator house.

Q. How do they unload?

83 A. They use a similar shovel.

Q. The same shovel? A. Yes sir.

Q. Same size? A. I can't say as to that.

Q. Do you know what the Crowell elevator uses to unload?

A. Yes sir.

Q. The same device? A. Same device, yes sir.

Q. Do you have more than one place to run this grain into, or in other words, can you unload more than one car at a time?

A. We can unload two.

Q. Do you know whether the other elevators that are your competitors in Omaha, South Omaha and Council Bluffs have facilities for unloading more than two cars at one time?

A. Some of them have, yes sir.

Q. What elevators?

A. The Omaha and the Trans-Mississippi can unload more than two—I don't know just the number.

Q. Do you know how many they can unload?

A. No sir, I do not.

Q. Well, do you know whether they can unload more than four cars at one time, or five?

A. I couldn't say as to the exact number, Mr. Rich.

Q. Do you know how many cars the Updike people can unload at one time?

A. No sir, I couldn't give you the number.

Q. Now, you said you could unload your first car in about 10 minutes?

84 A. We have unloaded a car within 10 to 12 minutes, but in the ordinary course of business it takes about 20 to 30 minutes to unload a car.

Q. Do you mean to unload a car simply, or to unload it and push the empty car out and push a loaded car in?

A. I mean as you say, to unload, push the empty car out, and pull a loaded car in.

Q. It takes from 20 to 30 minutes per car to do that?

A. Yes sir.

Q. What did you say—that you have one, or two places, to unload in at once?

A. We have two.

Q. If you had three or four places then you could handle just twice as many cars could you?

A. Nearly so, there might be some other conditions which might reduce the volume a little.

Q. During the period for which you have filed claims, how many cars a day did you receive on an average?

A. I should say an average of ten cars.

Q. About an average of 10 cars each day?

A. Yes sir.

Q. Then you would have no trouble in unloading that 10 cars in 10 hours or less?

A. We could do that easily.

Q. And probably did do it usually, didn't you?

A. Oh, yes.

Q. Are both of your handling places on the same side of the elevator?

A. No sir, one is on the west side and one is on the east.

85 Q. One on one side and one on the other.

A. Yes.

Q. Now, then does it take another man to operate any other machine in connection with this unloading device?

A. Yes sir, we usually have not less than four men in the handling of the cars—in the unloading of a car.

Q. Four men to the unloading of each car?

A. Yes sir, I should say so.

Q. What is the average weight of your cars—what is the average weight of the grain that comes in?

A. As to the size of cars?

Q. Per car, yes.

A. Well, the cars vary in capacity, some are 40,000, some 60,000 and others 100,000 pounds capacity. The average is probably 60,000 pounds.

Q. What would the elevation charge at a cent and a quarter on a 60,000 pound car amount to? A. $7.50.

Q. Seven dollars and fifty cents? A. Yes sir.

Q. If you handled 10 cars per day then, your elevation charges for that day would be $80.00, if they average 60,000 pounds?

A. Be $75.00.

Q. On a 60,000 pound car at ¾ of a cent, what would it amount to? A. $4.50.

Q. You say it takes about four men to each car?

A. Yes sir.

86 Q. Was all of the grain for which you have filed claim forwarded east within 10 days after its receipt?

A. I cannot answer that question, I don't know whether it was or not.

Q. You don't know whether it was or not? A. No sir.

Q. To what points in the east did you usually ship?

A. Well, we shipped to a great many of the eastern markets, to Chicago, Peoria, Nashville, Memphis, Little Rock and other southern points.

Q. In shipping out from your elevator at the time and during the time for which you filed claims did you ship out over any other road than the Burlington?

A. We did.

Q. Over what other road?

A. Various other lines, probably all the other lines, running east out of Omaha at times.

Q. But the Burlington would have to handle your loaded cars out originally from the elevator? A. Yes sir.

Q. But they were turned over to the other lines that they went east on? A. Yes sir.

Q. Did you receive an allowance from any of the other roads that you shipped east on, of any sort, during this time?

A. During what period?

Q. The period covered by your claims?

A. We did not.

87 Q. Have you received from any other road any allowances or rebates of any sort since that time, covering any part of the grain shipped, that is included in your claim?

A. We did not.

Q. It is a fact, is it not, that if the Union Pacific should refuse to pay these claims, or you should fail to recover for them, that the roads over which you shipped this grain to the east, would pay this elevation charge?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial.

Objection sustained. Defendant excepts.

Q. Have you filed claims with any other road that hauled this grain east for these same allowances, or a corresponding amount.

A. We have not.

Q. What is the general nature of the business conducted by your firm?

A. Buying and selling grain.

Q. Do you make an inspection of the grain after you receive it, or do you accept the inspection made by the officials in Omaha?

A. Our superintendent inspects each car as it is unloaded to see, whether in his judgment, it is equal to the official inspection.

Q. Do you keep a record of the inspection that you make?

A. I cannot say, my superintendent probably does.

Q. On a former hearing of this case, in answer to the question "You keep a record of the inspection," you answered "Yes sir," did you not?

88 A. I don't remember as to that.

Q. Well, now, do you or do you not?

A. I do not. If our superintendent keeps such a record, it is a part of the records of our Company, of course.

Q. Do you know whether you keep such a record or not?

A. No sir, I couldn't say positively on all cars. I am sure that he keeps a record on any car, which, in his judgment, is not equal to the official inspection.

Q. Do you weigh the grain at your elevator?

A. We do.

Q. Do you keep a record of that weight? A. We do.

Q. I think you stated that it was weighed by an official of the Omaha Grain Exchange?

A. I did.

Q. Is it inspected at your elevator by any official of the Omaha Grain Exchange?

A. No sir.

Q. That inspection which you do make then, is a private inspection?

A. Yes sir, except as we should call for a re-inspection on a car, then it is inspected—might be inspected at or inside the sheds of our elevator by an official of the Omaha Grain Exchange.

Q. What do you do with the grain after you take it in your elevator?

A. We unload it and weigh it in the elevator.

Q. What do you do if anything to increase the value of that grain or the grade of it, after you receive it at your elevator?

89 A. I can't say that we do anything to increase the value of it.

Q. You mix the different grades of it, don't you?

A. We oftentimes do.

Q. And you do that in your elevator do you?

A. Yes sir.

Q. What do you do that for?

A. It is necessary to mix two grades or more than one grade of grain together, because we haven't bins for each individual grade.

Q. You do not mean to say that is the only purpose of mixing the grain in your elevator, do you?

A. Well, that is the prime reason that it is mixed.

Q. Well, you mix grain of various grades, don't you, in your elevator? A. Yes sir.

Q. For the purpose of increasing or bettering the grain?

A. It is impossible to increase or better the grade by mixing. We can mix the grades together to make a uniform grade, but that is the only thing to be done.

Q. Would the value of that be greater or less than the average of the values that you mix?

A. It would be greater if we make a profit over the purchase price. If there is no profit to us over the purchase price, the value would be the same.

Q. But when you mix the various grades, you do it for the purpose of making a profit?

A. We do it for the purpose of merchandising it, or putting in a merchantable condition, putting out a merchantable grade.

90 Q. Well, you hope to get a better price for it by doing that?

A. I couldn't say that there is any better price obtained, but we would have to sell one grade of a certain kind of wheat at one price, and then another grade at a different price if we did that, because it was of different quality. By mixing the two together, or 20 together, we make a merchantable grade, and we have established a grade or a line of wheat that we can sell at a certain price. The man to whom we sell it wants 20

cars of that kind of wheat, and by mixing the different cars together, we can put out a uniform type or sample—a type line of wheat.

Q. You don't do that for fun, or for nothing, do you?

A. We do that to put our grain in such condition that we can sell it.

Q. You do that hoping thereby to get a price greater for the total wheat, than the individual parts would bring standing alone?

A. No sir, not if the buyer could be there and see the different grades of wheat. It is greater than the price we pay for it, of course; we hope to make a profit out of the wheat.

Q. Where you mix it, you don't sell it for less than the best grade is worth, do you? A. Oh, yes, always.

Q. You always do that?

A. Yes, sell for less than the best grade is worth.

Q. If the best grade that goes into the mixture—I mean do you sell it for less than the best grade that goes into the mixture is worth?

91 A. Assuredly, yes.

Q. Then you don't put very much of the best grade in that mixture, do you?

A. If we put more of the best grade in, it brings a greater price than if we put a lesser amout of the best grade in.

Q. Now you hope to gain on the general average price of all that grain, don't you, by that process?

A. About the only answer to that question is, that it puts the grain in a merchantable condition, it establishes the type line of wheat, of which we can sell 50 cars, whereas if we sold each individual car, one would be worth say, a quarter of a cent less than the other, and the other would be worth half a cent more and so on.

Q. You do all that work and go through all that process for the purpose of pecuniary profit?

A. For the purpose of merchandising the wheat, and we hope to make a profit.

Q. Why do you hesitate to answer my question?

A. Because I cannot agree with you in your absolute statement.

Q. You cannot agree with it? A. No sir.

Q. You do all this work then for the purpose of making your grain look a little better?

Mr. Smith: That is objected to as assuming something that the witness has not said at all.

No ruling.

A. My answer to that would be, that we do it for the purpose of making a type line of grain, which we may sell.

92 Q. You hope to increase thereby the general average of the price and make some money out of it?

A. No sir, I will say positively that it does not increase the value of the grain to mix it, it positively does not, but we sell this wheat very largely during the year to the Minneapolis Mills. We will build what we call a type sample. There were hundreds of cars of wheat sold out of Omaha on type samples, known as Nebraska-Iowa Grain Company Sample "B", that was number 3 hard wheat, and the Minneapolis Mills could use that line of wheat to mix with their northern wheat, and we could sell that line of wheat to better advantage by making it all like our sample "B", same test weight, same color, but there was no enhancement of value of the component parts of that sample "B" wheat by the mixing.

Q. You say you could sell it to better advantage?

A. Yes sir, because if we sold four cars that went into four cars of sample "B", and one would be worth the same price as the other. If we were selling each individual grade or car there would be a difference in what they were worth, and we would have to have the buyer before us, and agree on the price of those four different cars of wheat. By saying to the buyer we will give you four cars of sample "B" wheat, he knew what he was buying, we could trade by telephone or telegraph and do it in ten minutes; he knew what he was getting and we knew what we were selling.

Q. It enabled you to handle this wheat more advantageously and more expeditiously?

A. Yes sir.

Q. That is what you did it for?

93 A. Yes sir.

Q. It built up your business, in other words?

A. Yes sir.

Q. What do you call that process? A. What process?

Q. That mixing process? A. We call it mixing.

Q. Is that the same as blending?

A. Well sir, I don't know the exact meaning of the term "blending." I have seldom ever used it. I presume it would refer to the mixing of wheat of the same color or of the same kind.

Q. Well, do you know whether mixing and blending are one and the same thing? A. Yes sir, I should say they are.

Q. And you do both at your elevator?

A. We mix wheat; sometimes it doesn't blend and sometimes they tell us there is burned grain in the mixture which does not blend.

Q. You think then blending has a reference to color?

A. I should say so.

Q. When you bought a car of grain at some point on the Union Pacific west of Gilmore, just give the jury the course of that car of grain in reaching your elevator?

A. You mean, Mr. Rich, a car of grain bought from a shipper west of Gilmore, or on the floor of the Grain Exchange?

[A.] No, bought at a point west, where you bought it of the shipper?

94 A. If we buy it at a country station west of Gilmore, we instruct the shipper to bill the car to us at Omaha. That car would be set by the Union Pacific on the inspection track—

Q. Where is that inspection track?

A. It is on the Union Pacific tracks a little north of where we are now and near the river. I do not know its exact location, but I know its general direction.

Q. Well, what is done with it after it is set on the inspection track?

A. The inspector of the Grain Exchange "plunges" the car, and secures a sample of it which is delivered to us, in the trading room of the Grain Exchange.

Q. Suppose you buy some grain already in Omaha on the floor of the Grain Exchange, from the inspection there. Does that car then go on to the Burlington track just the same as the car that came in from west of Gilmore that was put on the inspection track?

A. Yes sir, after being ordered moved to Gibson by us.

Q. Who do you give that order to? A. J. J. Sherlock.

Q. Agent of the Union Pacific? A. Yes sir.

Q. That inspection track is a Union Pacific track?

A. Yes sir.

Q. In the case of grain that comes into Omaha over another railroad does that go onto the inspection track?

A. Yes sir, each road coming into Omaha has an inspection track.

Q. They don't have a joint inspection track?

A. No sir.

95 Q. Each road has its own?

A. Each road has its own.

Q. When you ship grain out from your elevator, to whom do you give instruction with reference to the movement of the grain?

A. To the Burlington.

Q. To the Burlington road? A. Yes sir.

Q. You do not give any instruction to any road east?

A. No sir.

Q. Do you have elevators out at various country points along the Union Pacific?

A. No sir, not on the Union Pacific.
Q. What road have you a line of elevators on?
A. Our elevators are all on the Burlington and the Great Western.
Q. How far is your elevator from the Union Pacific bridge across the river? A. About a mile and a quarter.
Q. Prior to the time this tariff was put into effect by the Union Pacific providing for a cent and a quarter or three-quarters of a cent per hundred pounds, did you elevate your grain in the same manner that you did after the tariff was put in—
A. Yes sir.
Q. And you elevated your grain the same during the time that tariff was effective and for which you have made claim?
A. Yes sir.
Q. And you are still unloading cars in the same manner?
A. Yes sir.
96 Q. And if there was no tariff in effect you would be obliged to unload cars in the same way? A. We would.
Q. And if there was no tariff in effect, you would unload cars in the same way? A. We would.
Q. You built that elevator at Gibson for the purpose of unloading grain into and shipping it out again?
A. We did, yes sir.
Q. Are you now attempting to comply with any tariff with reference to the time in which you unload grain?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial.

Objection sustained. Defendant excepts.

Q. And you would conduct your business, would you not, with reference to the shipping and unloading and handling of grain in just the same manner, whether or not the Union Pacific tariff was in existence or had been abolished?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, and not proper cross-examination.

Objection sustained. Defendant excepts.

Re-Direct Examination

By Mr. Smith:
Q. This grain that you handled at your terminal transfer elevator over what different lines of road did you purchase that grain and receive it from?
A. From all the different lines of road in Omaha—in Nebraska.

Q. Then all those cars that you handled at your elevator from time to time, do not come in over the Union Pacific?

97 A. Oh, no.

Q. How many different grain elevators did you say you operate of your own?

A. Fifteen.

Q. From those elevators you draw grain to this elevator?

A. Yes sir.

Q. You also buy on the Northwestern? A. Yes sir.

Q. Send out card bids? A. Yes sir.

Q. And buy on the exchange here from dealers who bring it in off the Northwestern?

A. Yes sir.

Q. And the Burlington? A. Yes sir.

Q. So these cars that you unloaded at your elevator come in off these other roads?

A. Yes sir.

Q. Some is purchased at stations where you have your own country elevators and some is grain you buy by card bids?

A. Yes sir.

Q. Now, when grain is shipped out—let us assume a car shipped over the Wabash, how does it reach the Wabash road.

A. Through a switching service.

Q. Performed by whom?

A. The first part of it is performed by the Burlington, I don't know to whom they deliver.

Q. To whom do you give those orders as to the switching service?

A. To the Burlington.

98 Q. What orders if any do you give to the Wabash?

A. No orders to the Wabash.

Q. Simply use the Burlington to switch this car to the Wabash track?

A. Yes sir.

Q. Then the Wabash gives you a bill of lading and away it goes?

A. Yes sir.

Q. In purchasing grain on the Grain Exchange, do you come in competition there with the Omaha Elevator Company, and the Trans-Mississippi?

A. Every day, yes sir.

Q. They purchase from the same people you try to purchase from, do they?

A. Yes sir.

Q. Do you know whether or not they send card bids to those different dealers along the line of the Union Pacific to whom you send card bids?

A. They do.
Q. It is true is it not, that the Omaha Elevator Company operates a number of elevators along the line of the Union Pacific?
A. Yes sir.
Q. Does the Trans-Mississippi? A. Yes sir.
Q. They have elevators along there too? A. Yes sir.
Q. Do they also purchase from dealers along the lines of the Union Pacific?
A. They do.
99 Q. And in that way you are dealing with the same class of people every day? A. We are.
Q. Are competing for the same grain? A. Yes sir.
Q. Both by card bid and on the floor of the Omaha Grain Exchange? A. Yes sir.

Re-Cross Examination

By Mr. Rich:
Q. With refecence to cars coming in over the Union Pacific, and transferred to your elevator by the Burlington: is there a charge by the Burlington for taking the car from the transfer track to your elevator of $2.00? A. Yes sir.
Q. Who pays that charge? A. We pay it.

Re-Direct Examination

By Mr. Smith:
Q. To whom do you pay it? A. To the Union Pacific.
Q. Does the Burlington render any bill to you?
A. They do not.
Q. The Union Pacific collects it all? A. They do.
Q. And it is your understanding that the Union Pacific divides it up with the Burlington?
A. The bill so states, that $2.00 of it is for the Burlington.
Q. That is to say, you give the Burlington no switch-
100 ing orders? A. None.
Q. And you pay the Burlington no money?
A. No money.
Q. The amount paid to the Burlington: is that a matter of contract between you and the Burlington? A. No sir.
Q. Have you ever had any dealings, negotiations or contracts with the Burlington as to what they are to get for the switching service? A. No sir.
Q. That is wholly a matter between the Burlington and the Union Pacific? A. A matter of tariff, I understand.
Q. You simply pay what the Union Pacific charges you, and if they split it up with the Burlington, that is a matter for them? A. Yes sir.

Re-Cross Examination

By Mr. Rich:

Q. You don't know that?

A. It is simply a matter of tariff, as I understand it.

Q. They put out a tariff by which it says it will charge so much for service of that character?

A. Yes sir. I had assumed that it is a matter of arrangement with the Union Pacific. If it were not, the Burlington would demand it from us before they moved the car.

Q. That is your conclusion of it? A. Yes sir.

Q. It is a matter of convenience for the shipper so the shipper can pay his bill all at one point?

101 A. That may be, but it is not true in the payment of freights. Each road collects their own freights.

Q. When you ship grain over the Missouri Pacific to St. Louis, does the Missouri Pacific collect from you?

A. That is on grain arriving at Omaha, I refer to. This is a switching charge, the Union Pacific collects a switching charge for both the Union Pacific and the Burlington.

Q. On grain that comes in over the Union Pacific?

A. Yes sir.

Q. And if grain comes over the Northwestern road, and the Burlington delivers it to you, who collects that?

A. The Northwestern.

Q. And that is true of all other roads entering Omaha?

A. Yes sir.

Re-Direct Examination

By Mr. Smith:

Q. After a car has been unloaded at your elevator, what do you do with it then?

A. The car is kicked out of the house, and we don't do anything with it, but the Burlington empties that track at stated intervals each day.

Q. So far as you are concerned with it, you are done with it when you unload it and shove it out? A. Yes sir.

Q. Do you give any orders, notice or directions to anybody?

102 A. Not to my knowledge.

Q. Your work is done when you unload the car and push it out as an empty? A. Yes sir.

Witness Excused.

It being 5 o'clock P. M., an adjournment was taken until tomorrow morning, May 13th, 1909, at 9:30 o'clock, at which time further proceedings were as follows:

103 William H. Anderson, a witness for the plaintiffs, having been heretofore called, sworn and examined, is at this time recalled for further direct examination as follows:

By Mr. Smith:

Q. Mr. Anderson, have you prepared and have you with you a statement showing the amount that was paid to the Omaha Elevator Company by the Union Pacific Railroad Company on account of the elevation allowance from the 26th of June, 1906 to the 31st day of December, 1907, inclusive?

A. Yes sir.

Q. You have that statement with you have you?

A. Yes sir.

Q. Will you let us have it marked as an exhibit?

(Exhibit referred to, marked plaintiffs exhibit 4.)

Q. Were the vouchers on each and all of those claims, shown in this document you have produced, and which is marked plaintiffs' exhibit 4, prepared by you in your office?

A. Yes sir.

Q. And your records show that those vouchers and claims have been paid? A. The records in the other offices do.

Q. This exhibit 4, is a true and correct statement of the claims showing the date of the voucher, number and amount of the voucher, and the date paid?

A. Yes sir.

Q. And at the extreme right hand column, it shows correctly the number of cars eliminated on account of not
104 being released during 48 hours, as provided in the tariff, during that period of time?

A. Yes sir.

Q. Your records show the refusal of the payment on those cars, does it? A. Yes sir.

Q. Do you have personal knowledge as to whether or not they were refused because of the 48 hour clause, or because they did not originate west of Gilmore, or did not come in over the Union Pacific, or did not afterwards move east—do you know about that?

A. Yes sir.

Q. What is your knowledge about that?

A. The 48 hour clause.

Q. Your records show that those cars remained there loaded more than 48 hours? A. Yes sir.

Q. As a matter of fact none of the cars that went to the Omaha Elevator Company would ever be off of the tracks of the Union Pacific would they?

A. I presume not.

Q. So if they were refused because of the 48 hour clause, it would be because the cars remained on a side track adjacent to the elevator more than 48 hours without being unloaded?

A. Yes sir. I presume so.

Mr. Smith: Plaintiffs offer in evidence plaintiffs' exhibit 4, statement to which the witness has been referring.

105 Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

The Court: Does this go to the objection that it is not the best evidence?

Mr. Rich: No sir.

The Court: The objection may be overruled then.

Plaintiffs' exhibit 4 is received in evidence, a copy of the same being hereto attached and made a part hereof.

To all of which the defendant excepts.

Cross Examination

By Mr. Rich:

Q. Were there any other cars eliminated for any other reason than that they were not unloaded within 48 hours?

A. Yes sir.

Q. Those cars do not show on this list, do they?

A. No sir.

Q. Well, then this is not a correct showing, is it of the transactions between the Omaha Elevator Company and the Union Pacific with reference to cars delivered to that elevator Company?

A. It is under the tariff, under the tariff and the amount paid.

Q. Did you refuse to pay any other items because the grain came in in foreign cars?

A. No sir.

Q. None of those were refused? A. No sir.

Q. And the only cars refused were on account of the 48 hour period?

106 A. Yes sir.

Q. You do not give the number of cars here I notice?

A. No sir.

Q. Have you the data with you by which you could show the total numbe of cars?

A. No sir.

Q. As connected with plaintiffs' exhibit 4?

A. No sir.

Q. Can you readily get the data showing the total number of cars involved in plaintiffs' exhibit 4?

A. Not very readily—I can get it.

Q. You can get it?

A. Yes sir, but it would be quite an extensive job.

Q. I note that this exhibit 4 only covers from May 7th, 1907, to September 30th, 1907?

A. No, the heading, Mr. Rich—You notice the first voucher is a large one, all previous ones are consolidated in that.

Q. What period does the first item on plaintiffs' exhibit 4 cover?

A. Covers from June 26th.

Q. 1906 down to what time? A. Down to—

Q. May 7th, 1907?

A. May 7th—well that is the date the voucher was paid. I couldn't say just the date of the item there, only the date of the voucher.

Q. But plaintiffs' exhibit 4, covers the transactions with reference to cars of loaded grain delivered to the Omaha Elevator Company from June 26th, 1906, to December 31, 1907?

A. Yes sir.

Q. Vouchers which were paid during that period?

107 A. Yes sir.

Q. Were all vouchers paid covering that period?

A. No, there is one voucher in those that were presented that was not paid until afterwards. It was some two hundred and eighty-nine dollars.

Q. Will you get the number of cars involved in the transaction that is shown on plaintiff's exhibit 4?

A. Yes sir.

Mr. Rich: That is all at this time.

Plaintiffs' exhibit 4 is here read to the Court and Jury by Mr. Smith.

Re-Direct Examination

(In the nature of further direct examination.)

By Mr. Smith:

Q. I will ask you, Mr. Anderson, if you have with you a statement showing the amount that was allowed and paid to the Trans-Mississippi Grain Company from the 26th of June, 1906 to the 31st of December, 1907?

A. Yes sir.

Q. Will you please produce that statement?

(Statement produced and marked plaintiff's exhibit 5.)

Q. Does this statement which you have presented and which has been marked plaintiffs' exhibit 5, show correctly the date and amount of the vouchers that were paid by the Union Pacific to the Trans-Mississippi Grain Company during the time covered by my previous question?

A. Yes sir.

108 Q. And does it also show truthfully the number of cars on which payment was refused? A. Yes sir.

Q. On those cars that were refused, do you know the ground on which they were refused?

A. Yes sir.

Q. What was the reason?

A. On account of not being returned within 48 hours as provided in the tariff.

Q. The Trans-Mississippi Grain Company's elevator is on a track of the Union Pacific, is it not? A. Yes sir.

Q. So that those cars that went to the elevator were at no time off of the Union Pacific tracks?

A. I understand so.

Q. When it was put on the tracks it remained there until it was unloaded. A. Yes sir.

Q. So if it failed to comply with the provisions of the tariff, it was because the car remained adjacent to the elevator loaded for more than 48 hours?

A. Yes sir.

Q. In other words the Company did not unload it within the 48 hour period, is that right? A. I presume so.

Q. All of those vouchers in payment of the claim of the Trans-Mississippi Grain Company were prepared in your office?

A. Yes sir.

109 Q. And those vouchers have all been paid?

A. According to the records, yes sir.

Q. This column headed "Date paid," shows when the vouchers were paid? A. Yes sir.

Q. The first column shows when you drew the vouchers?

A. Yes sir.

Mr. Smith: The plaintiffs now offer in evidence, plaintiffs' exhibit 5, being the statement of vouchers covering elevation charges in favor of the Trans-Mississippi Grain Company, to which the witness has just referred.

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

Mr. Smith: Does this go to the objection that it is not the best evidence?

Mr. Rich: No.

The Court: The objection may be overruled, and the exhibit may be received.

A copy of plaintiffs' exhibit 5, is hereto attached and made a part of this record.

To all of which defendant excepts.

Plaintiffs' exhibit 5 is then read to the Court and Jury by Mr. Smith.

Further Cross-Examination

By Mr. Rich:

Q. Mr. Anderson, you may state whether or not these allowances as shown by exhibits 4 and 5, were made
110 under the provisions of the tariff, or were based and allowed on written contracts between the Union Pacific and those two elevator companies?

A. Made on the basis of a published tariff.

Q. When you say that you refer to the cars you refused to pay upon? A. Yes sir.

Q. As a matter of fact however the contract for the payment of this charge was based upon written contracts between the Union Pacific Company, and those two elevators?

A. Well, as to that I am not informed.

Q. You are not informed? A. No sir.

Q. Mr. Anderson, will you prepare and furnish, to be put in the record, the number of cars outside of the 12 cars excluded in plaintiffs' exhibit 5, and the 26 cars excluded in plaintiffs' exhibit 4, involved in the two transactions as shown by plaintiffs' exhibits 4 and 5?

A. Yes sir.

Q. You don't know whether those vouchers have been paid or not, do you?

A. The records indicate that they have.

Q. You don't know of your own personal knowledge?

A. Not of my own personal knowledge, no sir.

Q. Have you made any payments to either of these elevators since the last date shown on the statements plaintiffs' exhibits 4 and 5?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial.

111 The Court: That is immaterial, I think.

Defendant excepts.

Mr. Rich: The defendant offers to prove by the witness that the Union Pacific has refused to pay to the Omaha Elevator Company, and to the Trans-Mississippi Grain Company any allowances based upon the tariffs in evidence, and upon which the causes of action in this case are based; in the case of the Omaha Elevator Company since the 30th day of September, 1907; and in the case of the Trans-Mississippi Grain Company since the 4th day of December, 1907.

Mr. Smith: That is objected to as incompetent and immaterial, and as being improper, no offer being necessary on cross-examination.

The Court: Objection sustained as not proper cross-examination.

Defendant excepts.

Witness excused.

112 Willis S. Pool is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed. P. Smith, he testified as follows:

Q. What is your full name? A. Willis S. Pool.
Q. What is your business? A. Grain business.
Q. With what company are you connected?
A. Nebraska-Iowa Grain Company.
Q. How long have you been?
A. About six years with the Nebraska-Iowa.
Q. What department are you employed in?
A. I am superintendent of the elevator.
Q. Of the elevator here in this city? A. Yes sir.
Q. Where is that elevator located?
A. It is about a mile and a half down the river at Gibson station on the Burlington.
Q. How far is it south of the Union Pacific Bridge across the river?
A. Well, it is a little over a mile I should say.
Q. Do you know where the inspection track is located on which the Burlington places cars that come in over its road?
A. Not definitely, no sir.
Q. Do you know about where it is? A. Yes sir, about.
Q. Which way is it from the Union Pacific bridge?
A. It is west, as I remember it, nearly straight west.
113 Q. Well, is it north or south of the bridge?
A. Well, it is nearly straight west of the bridge.
Q. About how far is it from your elevator?
A. Well, it is a mile and three-quarters, perhaps.
Q. Do you know where the transfer track is on which the Union Pacific places cars that are to be then switched by the Burlington to your elevator?
A. No sir.
Q. You don't know where that is? A. No sir.
Q. Were you employed there at the elevator in the years 1906 and 1907?
A. Yes sir.
Q. Who attends to the receiving of cars as they come in loaded and to the unloading of the cars, and so on?
A. Why, I usually attend to that.
Q. That is part of your work is it? A. Yes sir.
Q. During the year 1906 and 1907 did you receive there a large number of cars that came in off of the Union Pacific?

A. Yes sir.
Q. Loaded? A. Yes sir.
Q. What kind of cars were those as to ownership?
A. Well, they were mixed, there were foreign cars and Union Pacific cars—that is foreign road cars.
114 Q. Part of them were Union Pacific cars, were they?
A. Yes sir.
Q. What do you mean by foreign cars?
A. Well, cars that didn't belong to the Union Pacific, Wabash's, Rock Island's and eastern roads, Baltimore & Ohio.
Q. They all came in indiscriminately? A. Yes sir.
Q. Now tell the jury what efforts you made on receipt of those cars that came in off of the Union Pacific to get them unloaded and returned—what did you do about them?
A. Well, we tried very hard to get them unloaded, just as quickly as possible after they were set over there.
Q. Let us go through the procedure a little: when cars are placed by the Burlington at your elevator, where are they left?
A. The transfer cars, that is cars off of the foreign roads, are usually put in on the elevator track, the unloading track.
Q. Those cars that are brought in by the Union Pacific and switched by the Burlington, are placed where?
A. On our unloading track.
Q. That is at the elevator? A. Yes sir.
Q. How long did you require during this time, or how much time did you take, to unload these several cars as they came in off of the Union Pacific?
A. Well, that would vary. If they were up close to the house, we would unload them immediately or within 20 or 30 minutes; if they were back in the string, it might be four or five or six hours, before we could work up to them.
115 Q. How many cars could be placed on that track at one time? A. 17.
Q. What is the fact as to whether you ever received that many at any one time off of the Union Pacific?
A. I have no recollection of ever receiving that many.
Q. You would that same day receive cars off of different roads? A. Yes sir.
Q. They would be placed on the same track?
A. Yes sir, if the track wasn't full; if it was they would be set over on the—
Q. Now, tell the jury what was the maximum time that you took to unload any of those Union Pacific cars?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial, it might have taken three or four days.

Objection overruled. Defendant excepts.

(No response.)

Q. I mean to unload any of those cars that came in over the Union Pacific?

A. Well, there was none of them that were put on our tracks delayed more than 10 hours.

Q. What would be the minimum time?

A. Well, 30 minutes.

Q. If a car was unloaded at your elevator, that came in over the Union Pacific, and was a Union Pacific car, what did you do after it was unloaded?

A. We would run it out of the house, that was as far as we went with it.

116 Q. After it is out of the house it is then on the switch track there, is it? A. Yes sir.

Q. Who afterwards picks it up and takes it away?

A. The Burlington.

Q. If it was a car belonging to a foreign road having a line in Omaha, as, for instance, the Burlington, Rock Island or Milwaukee, what was done with it?

A. Well, I couldn't say.

Q. But who took the car away? A. The Burlington.

Q. The Burlington? A. Yes sir.

Q. What control or disposition or orders did you give as to the disposition of these cars when made empty?

A. None whatever—that is, from the elevator.

Q. How is that?

A. We gave no orders down there at all.

Q. When a car was made empty how far was it removed from the elevator?

A. Well, the track is about—I think it holds about 30 cars below the house, and it is on an incline, and sometimes they would come away down to the lower end, and sometimes they would be a hundred yards from the elevator, and sometimes real close to it; it depended on the condition of the track, whether it was full or not.

Q. If they were cars of foreign roads that did not have connection in Omaha, did you make any different disposition or give any different order with respect to them?

117 A. No, sir.

Q. On whose orders or direction did the Burlington come there and pick up those empty cars and dispose of them?

A. I couldn't tell you.

Q. Did they do so on any orders or direction from you?

A. No sir.

Q. What order or direction did you give the Burlington respecting the switching of the loaded car into the elevator?

A. Why, that was given from the upper office.

Q. So you gave no orders to the Burlington at all?

A. No sir.

Q. Either as to loaded or empty cars? A. No sir.

Q. Now, during this period of time, did you make any effort yourself to get these cars that had come in over the Union Pacific and had been unloaded at your elevator, back to the Union Pacific in the short space of time—or within the 48 hours—what did you do with reference to complying with that provision of the tariff?

A. Well, we couldn't do much of anything with the railroad, we tried to unload them as promptly as possible and would go out and ask them if they wouldn't hurry them back—something like that, but that is about all you could do.

Q. That is all you could do? A. Yes sir, you couldn't—

Q. About what proportion of the cars that you were handling at your elevator at that time, were Union Pacific cars, by that I mean cars that came in off of the Union Pacific—I don't mean ownership, but cars that had
118 been brought in by the Union Pacific loaded?

A. Well, that would be pretty hard to say without looking it up. I don't think over 25% of them were Union Pacific cars.

Mr. Rich: I didn't get that answer.

The Witness: I don't think—I am not sure about that, but that would be my guess on it.

Q. The Nebraska-Iowa Grain Company during this period of time were operating grain elevators of its own?

A. Yes sir.

Q. And you received shipments from those elevators?

A. Yes sir.

Q. The other grain you received was grain purchased by the Nebraska-Iowa Company from dealers? A. Yes sir.

Q. And that came in over different roads? A. Yes sir.

Q. Part Union Pacific and part other roads? A. Yes sir.

Cross-Examination

Ry Mr. Rich:

Q. When you say it sometimes took 20 or 30 minutes to unload a car that was located near the elevator, and sometimes a car was not unloaded for 10 hours, that has reference to the movement of the car up to the elevator, the unloading of it and putting it back on the empty track?

A. Well, that has reference to the cars as they were pulled up to the house. They put in 17 cars—our track will hold that many, and the last ones of course would be delayed.

119 Q. That is, you mean you would be ten hours in reaching them?

A. Yes sir.

Q. Then you could unload all of your cars on your loaded car track in 10 hours?

A. We have done it a good many times.

Q. What was the average number of cars you received per day from all sources?

A. I couldn't tell you without—

Q. Have you any idea?

A. Oh, I don't believe for the year, it would average over possibly 8 or 10, something like that.

Q. 8 or 10 cars per day? A. Yes sir.

Q. Well, according to the time you have already given, if your average receipt was 8 or 10 cars, you would unload those cars in 4 or 5 hours, each day?

A. If it was averaged for the entire year, yes sir.

Q. Would you have more than 17 cars on any one day?

A. We have had more than 17 cars, yes sir.

Q. During the period for which you have filed claim?

A. Yes sir.

Q. Where would the cars be then in excess of 17, that were not standing on the loaded track?

A. They were set usually on what they call No. 10 track.

Q. And where is No. 10 track from the loaded track?

A. It is adjacent—east—

Q. How would you get cars from No. 10 track over to the loaded track?

A. They would switch them over.

120 Q. Your loaded track, then, connects with the tracks that run on either side of your elevator?

A. How is that?

Q. I say, your loaded track connects with the tracks that run on either side of your elevator?

A. Where the storage—where the cars are stored, you mean?

Q. Yes. A. Well, they work on all those tracks.

Q. But you can unload cars on both sides of the elevator at the same time?

A. Yes sir, we can.

Q. Then there must be some connection between the tracks on both sides of the elevator, and this loaded car track?

A. There is. They have a switch up at the upper end. There is none at the house.

Q. There is none at the house? A. No sir.

Q. Does this loaded car track that will hold 17 cars, does that track run directly only on one side of your elevator?

A. The one on the east side holds 17 cars, and the one on the west side holds practically the same amount.

Q. Then you have two tracks you can store with loaded cars?

A. Yes sir.

Q. And one of those runs to the unloading bins on the east side of the elevator, and the other runs to the unloading bin on the west side of the elevator?

A. Yes sir.

Q. So that you have storage, with the tracks on both sides of the elevator, for 34 cars?

121 A. Yes sir.

Q. Then if you had 17 cars on each of those tracks, you could unload 17 of them on one side of the elevator, into the elevator, and 17 on the other side, without interfering in the movement of the cars in any way, up to the elevator?

A. Well, we could scarcely unload 34 cars in a day there—both sides.

Q. Well, you could move those cars from each of the loaded tracks up to the bin, where you unload them without interfering with the other track? A. Yes sir.

Q. Why couldn't you unload 34 cars in a day?

A. Well, we couldn't use quite so many men in a car without we split our gang up—would have to split our gang up more to use them on each side, and if we are unloading on one side only, we use some of the men to sweep out. We lose time sweeping out the cars.

Q. How many men does it take to unload a car?

A. Two to shovel, but you can use four to good advantage.

Q. If you use four, couldn't you unload the car quicker?

A. Yes sir.

Q. You can unload cars simultaneously on both sides of the elevator?

A. Yes sir.

Q. In doing that, you would have to use 8 men to unload both cars?

A. Yes sir, that is to expedite it, you would.

Q. Have you more than two unloading places, one on either side of the elevator?

A. No sir.

122 Q. You can only unload two cars simultaneously?

A. That's all.

Q. In unloading those cars did you ordinarily unload on both sides of the elevator, or only on one side?

A. Only on one side, usually.

Q. Did you employ four men?

A. Well, we have more than that.

Q. Well, I mean in the unloading itself?

A. It depended on how many there were. If we were real pushed, we would usually use four men, if not, we would only use two or three, as it might be.

Q. And it would take three men or two men longer to unload a car than it would four men? A. Yes sir.

Q. Did you ever have as many as 34 cars on your unloading tracks in any one day?

A. No sir.

Q. 17? A. Yes sir.

Q. What was the period that you have had as many as 17, during the period covered by your claims?

A. I couldn't say.

Q. But you never had 34—? A. No sir.

Q. You are sure you had 17?

A. I am quite sure we had 17—that is the track full.

Q. If you had wanted to, you could have employed extra help and could have unloaded 34 cars in one day, by unloading both sides of the elevator?

123 A. No sir.

Q. How many could you have—

A. We probably could have gotten out—possibly 30 cars.

Q. In one day? A. Yes sir.

Q. And you call a day about 10 hours working time?

A. Yes sir.

Q. But you never at any time during the period covered by your claim, had 30 cars to unload in one day?

A. Yes sir, I think we had.

Q. Well, do you know it?

A. I don't know it without looking it up.

Q. You say your elevator is about a mile or a little more below the Union Pacific bridge?

A. Yes sir, about a mile, or a mile and a half, something along there.

Q. That is, if the transfer track from which the Burlington would take your cars is located somewhere near the Missouri River bridge, the switching movement made by the Burlington down to your elevator, would be from a mile and a half to a mile and three quarters?

A. Somewhere near that I should say.

Q. And the same movement to return the empty cars?

A. Yes sir.

Q. And you think about 25% of all cars received by you at your elevator, were Union Pacific cars? A. I think so.

Q. Or in other words, cars coming in over the Union Pacific road?

A. I think something about that proportion, yes sir.

124 Q. That is what you mean—you did not mean cars owned by the Union Pacific, but you meant cars received by you over the Union Pacific? A. Yes sir.

Q. Both Union Pacific cars and foreign cars, were about 25% of your total receipts?

A. Somewheres in that neighborhood, I should say.

Q. Then if your average total receipts were about 10 a

day, you would receive from the Union Pacific in cars of all classes, from 2 to 3? A. Yes sir.

Q. Per day? A. Yes sir.

Q. And is that a fair average?

A. Why, I should think so without looking it up—I couldn't say definitely.

Q. What is the greatest number of cars you have received during the period in controversy from the Union Pacific in any one day? A. I couldn't say.

Q. Have you any idea? A. No, I haven't any idea.

Q. Well, did you ever receive 17 cars from the Union Pacific in any one day? A. Well, sir, I don't know.

Q. But from 2 to 3, would be a fair average?

A. I think so.

Q. Did you ever ask the Burlington Company to so set or switch the cars received from the Union Pacific Railroad Company so that they could be unloaded first?

125 A. I have asked the yard master, yes sir—the Gibson yard master, the assistant yard master.

Q. And did they ordinarily do that?

A. Yes sir, very often.

Q. So that you very often unloaded Union Pacific cars first? A. Yes sir.

Q. And if your average was two or 3 a day, then you usually unloaded Union Pacific cars in from an hour and a half to two hours?

A. Yes sir, very often.

Q. After they were received? A. Yes sir, very often.

Q. And you usually did that, did you?

A. Well, yes, we usually got them out in two or three hours when there wasn't a big bunch of them.

Re-Direct Examination

By Mr. Smith:

Q. You gave a preference to the Union Pacific cars in the matter of unloading and shoving them out of the house?

A. Yes sir.

Q. How many tracks adjacent to your elevator are there, on which cars can be run to be loaded and unloaded both?

A. Two.

Q. So if you are loading and unloading cars at the same time, how do you manage that?

A. We can only unload on the one side, when they are loading on the other.

Q. So if during the day, you are loading cars to ship out, and they are being unloaded on the other side, can you

126 use both sides to unload? A. No sir.

Q. If you are loading on one side of the elevator, can you unload on both sides at once? A. No sir.

Q. Now what is the fact as to whether during this period of time you were constantly receiving and shipping out during the same day?

A. Every day we was shipping out. Some days we would load out more than we would unload, other days we wouldn't load out so much.

Q. But you were constantly taking in grain on one side, and receiving it from the country and loading it out to persons to whom you had sold, on the other side?

A. Yes sir.

Q. The grain that you received and unloaded at your elevator,—is it weighed down there? A. Yes sir.

Q. By whom? A. By the Omaha Grain Exchange.

Q. How do you ascertain the weight of a car in making your settlement with the men from whom it is bought?

A. Well, we use track scales there, and the car is run in on the track scales and weighed.

Q. Well, is it the weight that is ascertained by the Omaha Grain Exchange down there at your elevator, is that the weight on which you pay the party from whom you bought it?

A. Yes sir.

Q. And is that the weight on which the freight is collected by the Union Pacific?

127 A. I understand it is.

Re-Cross Examination

By Mr. Rich:

Q. How long does it take you to load a car?

A. Well, that differs. We have loaded them in three minutes.

Q. What is your average time?

A. Well, probably 25 minutes—20 to 25 minutes.

Q. 25 minutes? A. Yes sir.

Q. Where was your loaded track, or your two loaded tracks, north or south of your elevator?

A. Well, they extend both north and south of the elevator.

Q. Where did the Burlington leave the loaded cars?

A. On the north side of the elevator.

Q. When you got ready to unload a car, whichever track it stood on, you would pull it forward to the unloading place at the elevator?

A. Yes sir.

Q. Then after you unloaded it, what did you do, shove it right on south?

A. Shove it right on south, yes sir.

Witness Excused.

128 George W. Cover is here called and sworn as a witness

on the part of the plaintiffs. Being examined in chief by Mr. Ed P. Smith, he testified as follows:

Q. What is your full name? A. George W. Cover.
Q. What is your business?
A. Assistant superintendent of transportation for the Burlington.
Q. How long have you been with the Burlington?
A. About 20 years.
Q. How long have you been in the transportation department with the Burlington in this city?
A. About four years.
Q. State to the jury just briefly what your duties are?
A. Handling all cars in general, the distribution of equipment, practically.
Q. Are you acquainted with the location of the elevator of the Nebraska-Iowa Grain Company?
A. In a general way, yes sir.
Q. Where is it located? A. At what we call Gibson.
Q. That is away down the river?
A. Down the river, yes sir.
Q. About how far is that south of the Union Pacific bridge?
A. Well, from—I should judge about a mile and a half approximately.
Q. Are there other industries and places to which cars have to be set down in that locality?
A. Yes sir.
129 Q. Gibson is sometimes referred to as the Burlington yard, is it? A. It is what we call our upper yards.
Q. Upper yards? A. Yes sir.
Q. Is there here in Omaha, South Omaha and Council Bluffs, what is referred to among the railroads as switching limits? A. Yes sir.
Q. When you say then, that a car must be kept within the switching limits, what do you mean by that?
A. Well, there are limits set wherein a switch engine can go without orders, without train orders.
Q. It can move a car within those limits, can it?
A. Yes sir.
Q. And if a switching charge is fixed by the railroad for a switching service, does that mean a car can be moved to any point within switching limits for that fixed charge?
A. As I understand it, yes sir.
Q. Has the Nebraska-Iowa Grain Company an elevator at Gibson, within the switching limits? A. Yes sir.
Q. Do you know where the transfer track or point of interchange between the Union Pacific and the Burlington is?
A. That is at Fourth and Jones streets, I believe.

Q. Which way is that from the Union Pacific bridge?
A. Well, that would be north.
Q. How far north? A. Well, a very short ways.
Q. How far do you think?
130 A. I would think possibly a quarter to a half a mile.
Q. Now what is that transfer track?
A. It is a track for the purpose of the interchange of business, as between the Union Pacific and the Burlington.
Q. If cars come in over the Union Pacific that are intended for industries located upon the tracks of the Burlington, where are those cars placed by the Union Pacific?
A. On what we call the Union Pacific transfer.
Q. Is that the same thing as the point of interchange between the Burlington and the Union Pacific? A. Yes sir.
Q. If cars come in over the Burlington intended for industries located upon lines of the Union Pacific, where does the Burlington place them? A. On the same track.
Q. Is there more than one track there for that?
A. That is all I believe for the interchange of freight business.
Q. How long has that track been used as a point of interchange between the Burlington and the Union Pacific?
A. I couldn't state definitely but I believe for several years.
Q. As long as your service in connection with it here?
A. As far as I can remember, yes sir.
Q. Now that transfer track, I suppose, has reference to the interchange of traffic in carload lots? A. Yes sir.
Q. Tell the jury what cars would be placed on that track by the Union Pacific, that is, whether it refers wholly to grain cars or others? A. All classes of business.
131 Q. If wholesale houses here in town located on the tracks of the Burlington receive a car load of goods that came in over the Union Pacific, would it be placed there?
A. Same place, yes sir.
Q. Or a carload of grain? A. Yes sir.
Q. Or a carload of agricultural implements? A. Yes sir.
Q. Anything and everything that comes in in carload lots over the Union Pacific that is intended for industries located on the tracks of the Burlington is placed on this point of interchange on what is known as the transfer track?
A. All classes of freight.
Q. Then what is done with it after it is placed there?
A. It is switched to the different industries, to the different consignees, as they may be located in the Burlington yards.
Q. These industries located on the tracks of the Burlington, where are they, within how much of a range are they located? A. I couldn't say.

Q. Well, does it take in South Omaha?

A. Well, we do switch to South Omaha, but that I believe necessitates a different handling than it would if it is located in what we call the Omaha yards.

Q. Well, if they came in over the Union Pacific intended for industries located on the line of the Burlington in South Omaha would they be placed there?

A. Yes sir.

Q. And the Burlington would pick them up and they would be distributed by them?

132 A. Yes sir.

Q. If they are intended for the Nebraska-Iowa elevator down at Gibson, they would be placed there?

A. Yes sir.

Q. If they are intended for any industry located in Omaha, South Omaha or Council Bluffs?

A. Yes sir, that is my idea, although I understand some cars are interchanged through the Union Stock Yards, although owned by the Burlington.

Q. Let us assume a car for an industry located in Council Bluffs on the Burlington came in over the Union Pacific, where is it placed?

A. Well, I suppose it would be placed on the same transfer to be handled over the Burlington to Council Bluffs. I don't quite understand your question.

Q. Suppose an industry in Council Bluffs located on the line of the Burlington, and cars came in from Columbus, Nebraska over the Union Pacific, for that industry, would it be placed on this transfer track, on this side of the river, or would the Union Pacific haul it to Council Bluffs?

A. I believe the Union Pacific would haul it to Council Bluffs.

Q. So the transfer track on this side of the river is simply used by the Union Pacific and the Burlington for industries on this side of the river?

A. Yes sir.

Q. And no matter what industry it is intended for, it is put on this one switch track?

A. Yes sir.

Q. And from that I understand, the Burlington picks them up and distributes them to wherever the industry is located?

133 A. Yes sir.

Q. Does the time that is necessary to distribute these cars to the several industries from this transfer track, or point of interchange, depend in any measure upon the volume of traffic?

A. In a measure it does.

Q. Would the time that would be required for the Burlington to make disposition of all of those cars that have been placed on the transfer track, be in any manner dependent upon the number of cars that they had to distribute to where the industries were located?

A. It naturally would.

Q. The greater the volume of traffic, or the more congested the traffic becomes, the longer time it takes to make that disposition of cars?

A. That is all.

Q. Now in the switching of those cars to those industries is there a switching charge made?

A. Yes sir.

Q. Who pays the Burlington for the switching of those cars to those several industries?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

The Court: I don't see how that is material, although I let you show it yesterday—I don't see how it is material to the question we are investigating here.

Mr. Smith: I will withdraw the question.

Q. You may state, Mr. Cover, if you are familiar with the movement of cars from this transfer track to the several industries, and the length of time that is required, having in mind the volume of traffic, as it differs at different times, so that you can tell the jury what is the usual and reason-
134 able time required to take a carload of grain from the transfer track, after it has been placed there by the Union Pacific, switch it to the elevator of the Nebraska-Iowa Grain Company at Gibson, allow it to remain there from—oh, one hour—yes, from one hour to 10 hours, in order that it may be unloaded, then pick up the empty car and place it back on the transfer switch, or point of interchange?

Mr. Rich: I would like to ask the witness a few questions.

The Court: Yes.

Cross-Examination

By Mr. Rich:

Q. You say there is only one exchange track down there?

A. I believe I qualified that—one transfer track in general use.

Q. Don't you know there are two tracks down there, one on which the Burlington sets cars destined for the Union Pacific, and one on which the Union Pacific sets cars destined for the Burlington?

A. I think that is true.

Q. And don't you know that anything that comes in over the Union Pacific for any industry located on the Burlington track in South Omaha, that the exchange is made at South Omaha?

A. I don't know. I believe I qualified my answer there.

Q. Have you ever known any carload coming in over the Union Pacific destined for an industry on the Burlington track in South Omaha, to be placed on the exchange track at 4th and Jones?

A. No sir, I couldn't make a positive statement that I do. I couldn't say I positively know.

135 Q. Well, what is your duty down at the Burlington.

A. Handling the distribution of equipment.

Q. What do you mean by that?

A. Placing cars on orders for loading and unloading.

Q. That is, when you receive a request for a car it is one of your duties to see when that man can get that car and to see that an order is put out that an empty be delivered to him.

A. Yes sir.

Q. What have you to do with loaded cars that come into Omaha?

A. In a general way we handle the business in the same way, although we do not handle the individual cars.

Q. You do not handle the individual cars?

A. No sir, have nothing to do with the individual cars.

Q. Have you had any personal experience out in the yard in the movement of those cars back and forth from the exchange track down to Gibson?

A. None whatever. I couldn't say that I have traced the movement of cars to any particular firm.

Q. Do you know anything from personal experience or observation about the time it takes to move a car down to Gibson and bring it back?

A. Personally, no, except as my duties go; I know that it takes a certain time.

Q. What kind of a record do you keep?

A. We do not keep any record so far as my individual office is concerned, the records are kept by the local office.

Q. So there is no record kept in your office that would advise you of the time it takes? A. No sir.

136 Q. And you haven't any particular experience on the track that would give you any idea of the time it takes?

A. None whatever, no sir.

Mr. Rich: We object to the last question asked the witness on the direct examination, as being incompetent, irrelevant, immaterial, and no sufficient foundation laid.

The Court: I did not hear all his testimony distinctly, as to his knowledge of the length of time it took after his car was set in on the transfer track.

Mr. Rich: He says he kept no record in his office.

The Court: I know he didn't keep a record, but what was his knowledge of that. In a general way, did he keep track of when one car left the transfer track, or when it was set in on the transfer track, and when it was brought back (Turning to the witness) What is your knowledge on that, do you know the length of time when a car is set in on the transfer car track, destined for the elevator at Gibson, before it is returned again?

The Witness: We have a copy of a record kept by the local office, which shows the interchange of all cars at all stations, so that a car coming in over the Union Pacific would show the date and hour received, and the date and hour returned to the Union Pacific.

By Mr. Rich:

Q. That is not a part of the records of your office—that is not kept in your office however?

137 A. No sir.

Q. And it is not a part of your duty to keep that record? A. No sir, not a part of our duty.

The Court: I think the objection should be sustained. Get the party that keeps that record. That would be the best evidence. I don't think this witness shows familiarity with the movement and the time of the trains. He is the man who is in the office, and not the man who is on the tracks. I think you can get some one to testify to that without reference as to whether he kept the record or not. The knowledge of this witness is derived largely from what records and reports have been shown to him, rather than practical knowledge of the matter, and therefore, I think the report should be brought in.

Direct Examination Resumed

By Mr. Smith:

Q. What do you, in your office, have to do, if anything, with the handling of cars here in the yards and the placing of them at different industries?

A. Only in a general way we have charge of the movement of all equipment.

Q. Who is there that has more direct charge of the movement of those cars from transfer tracks to industries on the line of the Burlington here in this city?

A. Do I understand you to mean direct charge?

Q. Yes. A. The agent and the yardmaster.

138 Q. Who is that?

A. J. L. Harrington. I can't tell you the name of our yardmaster now. It has been changed recently.

Q. Are those persons in any way under your direction or supervision? A. Generally, yes sir.

Q. Do they make reports from day to day of the movement of the cars?

A. We get a copy of the interchange reports of all cars interchanged with connecting lines.

Q. Do you get them at your office? A. Yes sir.

Q. Copies of those records? A. Yes sir.

Q. Do you keep those copies?

A. For a short time only, not permanently.

Q. You examine those reports do you, to see how the cars were moved?

A. Whenever it is necessary. We do not make a general examination.

Q. In that way have you become familiar, so that you know by your experience and your observation what is the reasonable time required from time to time, having in view the volume of traffic, so that you can tell the jury what is the reasonable time required to move a car of grain from the transfer track or point of interchange to the elevator of the Nebraska-Iowa Grain Company, permit it to remain there from one to ten hours, that it may be unloaded, then have it taken up by your switch engine, and removed and returned to the transfer track? A. I think so.

139 Q. You may tell the jury what is the necessary and reasonable time in which to perform that service?

Further Cross Examination
(As to witness's competency).

By Mr. Rich:

Q. You say you have never traced one of those cars down there as a practical matter?

A. I stated, I believe, I never traced the individual cars, but only in connection with the general movement.

Q. Where do you get your information from, this record that you keep in your office? A. Yes sir.

Mr. Rich: We object to the last question asked the witness by counsel for plaintiffs, for the reason that the same is incompetent, irrelevant and immaterial and no sufficient foundation laid.

The Court: I am inclined to think where a person has to testify from the records and so forth, that the records should be produced, or at least good reasons shown why they are not.

To which ruling of the court, plaintiffs except.

To which ruling of the court, plaintiffs except.

Direct Examination Resumed

By Mr. Smith:

Mr. Smith: Plaintiffs offer to prove by the witness now on the stand that the reasonable time in which to make the movement specified is 4 to 5 days.

Mr. Rich: To which the defendant objects as incompetent, irrelevant and immaterial, and no sufficient foundation laid.

140 Objection sustained.

Plaintiffs except.

Q. Now, let me ask you a question—please give me the names of the persons who have the more direct control and direction of this movement, and who come more personally in contact with it?

A. J. L. Harrington is local agent, and, as I stated before, I cannot give you the name of the yard master.

Q. But it would be the yard master? A. Yes sir.

Q. Who, do you know was the yard master during the years 1906 and 1907?

A. Well, I couldn't state—there has been several changes.

Q. Mr. Harrington has been in his position for some time?

A. Yes sir.

Q. Mr. Cover, when a car comes in over the Union Pacific, intended for an industry on the line of the Burlington, and after it is placed on the transfer track, is there any per diem charge on that car, accruing to the Union Pacific?

A. There is a per diem charge on the car, covered by what we call a reclaim.

Q. Explain to the jury what that is.

A. There is a per diem charge on all equipment that is foreign to the road handling the cars, and what is called a switching reclaim is made, as agreed on by roads centering in any particular city or locality as to the average length of time it takes to return a car to the delivering road. For that period the receiving road—or the delivering road rather—can reclaim—I want to change that—the receiving road can reclaim against the delivering road for the amount of that per diem for that time.

141 Q. Supposing a car of grain comes in over the Union Pacific intended for the Nebraska-Iowa Grain Company, placed on this transfer track, how much of a reclaim is allowed in favor of the Burlington road?

Mr. Rich: Just a moment—Is that contract between the roads in writing?

The Witness: As I understand it it is.

By Mr. Smith:

Q. Have you a copy of it? A. No sir.

Q. Is it in the form of a printed circular or pamphlet?

A. Yes sir.

Q. Has your office one of them? A. Yes sir.

Q. Can you get us one of them? A. Yes sir.

Q. Was that in force in 1906 and 1907 between the Burlington and the Union Pacific?

A. I believe it was.

Q. Does that show the per diem charge that the Burlington has to pay to the Union Pacific during the time that intervened between the placing of the car on the transfer switch and the return of the car to that transfer track?

A. It shows only the per diem reclaim time. They have to pay a per diem on all time when they have the car in their possession.

Q. And it is recorded as in the possession of the Burlington from the time it is placed on the transfer track
142 until it is returned to the transfer track by the Burlington?

A. Practically, yes sir—There is a slight difference. The only difference is, there is an agreed time as to the acceptance of the cars. Not necessarily the time they are placed on the transfer; but the delivering time between the Union Pacific and the Burlington would be at an agreed time when the cars are inspected and properly accepted by the Burlington.

Q. Do I understand that the roads have made an agreement as to the length of time that the Burlington shall have in which to take this car from the transfer track, deliver it to the industry and bring it back to the transfer track?

A. Free time, yes sir.

Q. How is that? A. Free time.

Q. Then this agreement—you will produce that in Court, will you? A. Yes sir.

Q. That will show the amount of time that has been agreed upon by the Burlington and the Union Pacific as the time within which the Burlington shall take this car to the Nebraska-Iowa Grain Company and return it to the Union Pacific? A. I think I can show the exact time, yes sir.

Q. Can you have that here for us at half past one?

A. I think so, yes sir.

Mr. Smith: I wish you would.

Witness excused.

143 James H. Brady is here called and sworn as a witness on the part of the plaintiffs. Examined in chief by Mr. Ed. P. Smith, and testified as follows:

Q. State your full name?
A. James H. Brady.
Q. What is your business?
A. I am in the employ of the Stock yards at South Omaha.
Q. In what capacity?
A. Superintendent of the Union Stock Yards switching department.
Q. Were you superintendent of the Union Stock yards switching department in 1906 and 1907?
A. Part of 1906 and all of 1907.
Q. I call your attention to Exhibit C, that is attached to the plaintiffs' petition, and which is admitted by the answer as having been published by the Union Stock Yards Company, and ask you if you are the J. H. Brady whose name appears there as Superintendent? A. Yes sir.
Q. Was that circular issued by you at or about the time it bears date "Effective May 1, 1906?" A. Yes sir.
Q. Now, I call your attention to the last line of the circular reading as follows: "Foreign cars received from the U. P. R. R. Co., may be delivered, loaded as routed". Please explain to the court and Jury how that comes to be in the tariff or circular and what its history is?

144 A. Well, previous to the issuing of this circular I had taken up the matter of the return of foreign cars received from the roads at South Omaha, and I had sent them—each of the roads—a copy of the circular that I proposed to issue, if it was agreeable to them. Those copies of this circular were returned to me, some of them with amendments, and some of them without amendments, and, after securing the assurance of the different roads that with the corrections or amendments they suggested, the circular would be satisfactory, it was issued.
Q. Is that true of all the roads here at Omaha?
A. That is true of all the roads mentioned in this circular.

Mr. Rich: How was that assent of the Union Pacific, in writing?

The Witness: It was in writing, yes sir.

Mr. Rich: Have you that?

The Witness: I don't think I have, Mr. Rich, at the present time, it was so long ago, and at the time it wasn't con-

sidered a matter of very much moment and the correspondence was misplaced or destroyed after the circular had served its purpose.

Mr. Rich: We move to strike out that part of the witness's answer, with reference to the assent of the Union Pacific.

Motion overruled. Defendant excepts.

By Mr. Smith:

Q. After this circular was issued—just explain to the jury a little what is within that—if a car was unloaded at the elevator of the Updike Grain Company, that belonged to—
145 we will say—the Rock Island road, what was done with that car when it was made empty, by the Stock Yards Company?

A. Under this circular it was returned to the Rock Island road.

Q. And that was true, irrespective of the road over which it had come into Omaha, was it?

A. Into South Omaha, yes sir.

Q. No matter whether it come over the Union Pacific, the Burlington or whatever it was, when it was made empty, it was returned to the Rock Island? A. Yes sir.

Q. And that was true of all roads having lines in South Omaha, was it?

A. Yes sir, with certain exceptions.

Q. What were they?

A. Well, the C & N W raised some objection to our delivering to the M & O—or to the Missouri Pacific, rather—which handles the M & O business at South Omaha. M & O cars that came in over the C & N W., they wanted them delivered back to them.

Q. Did the Union Pacific make any objection? A. No sir.

Q. After that circular was prepared by you, was it printed in circular form? A. Yes sir.

Q. And were copies of that circular furnished to each of the roads? A. Yes sir, they were.

Q. Mentioned in that? A. Yes sir.

146 Q. Did the Union Pacific at any time after its issuance object to any of its provisions as printed?

A. No sir, not to my knowledge.

Q. Were those—after that circular was issued by you, were those the rules under which cars received at industries located upon the tracks of the Union Stock Yards were handled after the cars were made empty? A. Yes sir.

Q. Under those rules if a New York Central car, for example, came in over the Union Pacific, loaded for any industry that was on the tracks of the Stock Yards Company, when

that car was made empty, if that industry desired to reload that New York Central car, what was done with it?

A. They were permitted to reload it if they wanted to—if they wanted the New York Central car—if they wanted to load a New York Central car.

Q. If they wanted to load it, in the direction of the home road, they were permitted to do that? A. Yes sir.

Q. I wish you would tell the jury what brought about the publication of this circular—how did it come to be gotten up by you to provide for the disposition of these several cars when made empty?

A. Well, there are 8 or 9 different roads doing business in South Omaha with which we connect, and each one of those roads had a number of cars in its service that have different initials. For instance, the Missouri Pacific has some cars that are lettered "C. B. Railway", meaning Central Branch
147 Railway; others lettered "C. B. U. P. Railway"; "F. S. W. W." Railway and so forth. Now it was a difficult matter for a yard master to know to whom those cars belonged, and the purpose of issuing this circular was to call their attention to the road that those different cars belonged to, in order that when they got one of them, they might deliver it when it was empty to the road that owned it, or leased it, or to the home road.

Q. Well, was it the desire of the several roads named in that circular that those cars should be disposed of as that circular provides?

A. I don't know whether it was their desire or not. I asked for their consent to the issuing of the circular, and I issued it and I had their consent, or I wouldn't have issued the circular.

Q. Can you explain how it comes that this provision near the last line of the circular which makes different disposition of foreign cars received from the Union Pacific, from what it makes of foreign cars received from other lines of road—how did there come to be that difference?

A. Well, I don't remember. I haven't a sufficiently clear recollection of that, Mr. Smith, to say just why that was, that that last line was put in there. I wouldn't put it there though, without authority for it, I am satisfied of that.

Q. Without authority from the Union Pacific?

A. Yes sir.

Q. Your best recollection is, it was put in there at their request, with their consent at least?

A. It was with their consent, I am sure of that.

148 Cross-examination

By Mr. Rich:

Q. Was this circular filed with the Interstate Commerce Commission? A. No sir.

Q. Never has been? A. Not to my knowledge.

Q. Mr. Brady, how long have you been with the Stock yards Company prior to May 1st, 1906?

A. I think I went with the Stockyards Company in 1900, Mr. Rich, 1900 or 1901—the latter part of 1900.

Q. In your position—how long had you held your position as superintendent prior to May 1st, 1906?

A. I think I had been superintendent—my recollection is —I am not clear on that point, but my recollection is that I was appointed superintendent in the latter part of 1905, in October or November.

Q. Did you personally have any talk with anyone connected with the Union Pacific about this circular?

A. I had no talk with anyone.

Q. How is that? A. No conversation with anyone.

Q. No conversation with anyone? A. No sir.

Q. Who was your general manager then?

A. Mr. Kenyon.

Q. Do you know whether he had any talk with any official of the Union Pacific?

A. I don't know whether he did or not.

149 Q. You don't remember what form any assent to this circular was in?

A. The assent was given—by each of the roads, was given in writing; I am positive as to that, but just what form it was in I don't know, couldn't say at the present time.

Q. Have you made any search for this assent of the Union Pacific?

A. I have. The correspondence was all kept in one file. I have looked for it, but I have been unable to locate it.

Q. Do you remember what official signed for the Union Pacific?

A. No sir, I do not, Mr. Rich. I wouldnt want to state who signed for them. I have a recollection but may be wrong about that, and I wouldn't care to say.

Q. Who do you think it was?

A. I think it was Mr. Ware.

Q. The superintendent? A. Yes sir.

Q. What does this mean (reading from the circular) "If loaded by industries located on this Company's tracks, and otherwise routed, will not be delivered, but will be returned for unloading, and a charge of $5 per car will be assessed against the loader?"

A. That clause was put in there to prevent the packing companies and other industries from loading foreign cars and routing them to roads other than they were received from?

Q. What do you mean by "foreign cars"?

A. Cars other than those mentioned in the body of the circular.

Q. Then the words "foreign cars" in this circular, haven't any reference to whether they belonged to a railroad outside of this state and having no switching connection at South Omaha?

150 A. Those cars that are mentioned specifically in the body of the circular were considered, in issuing the circular, as local cars, as belonging to the roads that had a connection with us at South Omaha; cars other than those mentioned specifically were considered as foreign cars.

Q. Then Pennsylvania or B & O cars would be foreign cars? A. Foreign cars, yes sir.

Q. Now then "if loaded by industries located on the tracks of this Company, and otherwise routed"—what does "otherwise routed", mean? (Reading from the circular.)

A. Routed by some other route, other than the road from which we received the car at South Omaha.

Q. "Foreign cars—except those received from the U. P. RR. Co. will not be delivered"? (reading from the circular.)

A. Yes sir.

Q. Now if a Pennsylvania car came in over the Rock Island loaded with grain for the Updike elevator, when it was unloaded what would you do with that Pennsylvania car?

A. It would have been returned to the Rock Island road.

Q. If it came in over the Union Pacific, what would be done with it?

A. It would have been delivered to any road by which the Updike Grain Company might have routed it.

Q. That is provided they had loaded it out? A. Yes sir.

Q. That applied then to all roads, except the Union Pacific road? A. Yes sir.

Q. Supposing a box car or a refrigerator car belonging to some other road came in over the Union Pacific

151 destined for Cudahy, and when it was unloaded, it was reloaded by Cudahy for shipment west over the Union Pacific, what would you do with that car?

A. A box car belonging to a foreign road that came in over the Union Pacific?

Q. A refrigerator car?

A. We would have delivered it back to the Union Pacific if it was so loaded.

Q. Well, wouldn't that be within the exception?

A. No sir. That clause was simply meant to prevent the loading by the packers and other industries on our tracks via the routing—via roads other than we received them from, of foreign equipment.

Q. Well, then, if a box car—a Pennsylvania box car—came in loaded with grain for Updike's and was unloaded, and Updikes for some reason wanted to use that car to ship grain to a milling company out in Nebraska, if that were possible, would you deliver that loaded car to the Union Pacific under that circular?

A. If it came in over the Burlington?

Q. No, if it came in over the Union Pacific?

A. And they should load it and route it via the Union Pacific—

Q. West.

A. Yes sir, we would have delivered it to them.

Q. If it had come in over the Rock Island and been unloaded and reloaded for a point west on the Rock Island, would you have delivered it to the Rock Island?

A. Yes sir.

152 Q. Well, then what about that exception (reading from the circular "except those received from the U. P. R. R. Co.,—will not be delivered, but will be returned for unloading, and a charge of $5 per car will be assessed against the loader?"

A. All of the roads this circular was submitted to objected to our delivering to other roads foreign cars that they had delivered to us.

Q. In case of a B & O car loaded with grain coming in over the Rock Island destined for the Updike elevator, when empty, if the Updike elevator should reload that car for a point east over the Rock Island, would you accept that and deliver it to the Rock Island, or return it to the Updike Company?

A. If it came in over the Rock Island and went out over the Rock Island?

Q. If it was to go out over the Rock Island.

A. We certainly would have delivered it to the Rock Island.

Q. If it came in over the Rock Island, and after being made empty, was reloaded with grain for an eastern point on the Northwestern, would you have delivered that car to the Northwestern?

Mr. Smith: If it comes in over the Rock Island and is loaded out over the Northwestern—a B & O car?

The Witness: If it came in over the Rock Island and was loaded out over the Northwestern, under this circular, we would have done so.

Mr. Smith: Does this circular not say "If loaded by industries—

The Witness: No, I am wrong about that, we would not have delivered it.

153 By Mr. Rich:

Q. You wouldn't have delivered it? A. No.

Q. Then your construction of that circular is, that with the exception of cars coming in over the Union Pacific, you would not deliver to a road other than the one which it came over, a foreign car loaded by Updikes?

A. That is right, yes sir.

Q. (reading from the circular) "Foreign cars, received from the U. P. R. R. Co., may be delivered, loaded, as routed," Does that refer to a B & O car that would come in over the Union Pacific, and being reloaded for an eastern point, and tendered to any road going east?

A. Yes sir.

Q. There is no provision made for the delivery of foreign cars specifically here except as found in the last two sections of the circular?

A. I don't remember, but I don't think there is.

Q. That is no attempt to do so?

A. No sir.

Q. You say you are superintendent of transportation for the Stock Yards?

A. Superintendent of the switching department.

Q. Then you are familiar with the switching movements of all cars over your tracks, are you?

A. I am familiar with some of them.

Q. Well, in a general way? A. Yes sir.

Q. It is your duty to keep track of that?

A. Yes sir.

Q. And superintend it? A. Yes sir.

Witness excused.

154 At this time a recess of five minutes was taken, after which further proceedings were as follows:

Lawrence Kearney is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed P. Smith, he testified as follows:

Q. What is your full name?

A. Lawrence Kearney.

Q. What is you business?
A. Employed by the Updike Grain Company.
Q. Where are you employed?
A. South Omaha.
Q. In what capacity?
A. As superintendent of their elevator there.
Q. Their elevator has been referred to in this case as being located in South Omaha? A. Yes sir.
Q. On the Stockyards track? A. Yes sir.
Q. Do you receive grain there at that elevator?
A. Yes sir.
Q. Other than in carload lots? A. No sir.
Q. They buy grain that is received at that elevator wholly in carload lots? A. Yes sir.
Q. Shipments are made from that elevator?
A. Yes sir.
Q. How large an elevator is that?
A. Well, half a million—five hundred thousand.
155 Q. Five hundred thousand bushels? A. Yes sir.
Q. Were you superintendent in 1906 and 1907?
A. Yes sir.
Q. During that time did you receive at that elevator, grain that arrived over the Union Pacific?
A. Yes sir, we did.
Q. As that grain comes in, do you personally see the cars and grain as it arrives? A. Yes sir.
Q. That is part of your business? A. Yes sir.
Q. When cars are received there, is there anything to indicate the route over which it came, or the place where the grain came from?
A. Well, I know where they come from.
Q. You have the way bills or the shipping bills or something that indicates where each car of grain comes from?
A. Yes sir.
Q. Now, during the year 1906 and 1907, was the grain that was received off of the Union Pacific road received wholly in cars owned by the Union Pacific? A. No sir.
Q. What was the class of cars in which that grain was received?
A. Well, they were mixed, they were foreigns of most every description—most all foreign cars.
Q. Were there some Union Pacific cars—cars owned by the Union Pacific? A. Yes sir.
156 Q. Were there some cars received over the Union Pacific loaded with grain and which cars belonged to other roads here in Omaha and South Omaha?
A. Yes sir.

Q. What, for instance, Rock Island, Burlington, Northwestern, and Milwaukee cars? A. Yes sir.

Q. During that period of time were cars received that belonged to foreign roads not having lines in South Omaha, such as the New York Central, Baltimore & Ohio and Pennsylvania cars? A. Yes sir.

Q. Were those cars of grain received over the Union Pacific all unloaded at this elevator?

A. Yes sir, I think so, practically . . ., yes sir, they were all unloaded.

Q. What is the fact as to whether they were all unloaded there or just part of them?

A. They were all unloaded.

Q. Grain that is received at the elevator of the Updike Grain Company at South Omaha, where is it weighed?

A. It is weighed in Hopper's scales in the elevator; elevated up above and weighed in hopper scales, taken out of the car first and elevated.

Q. By whom is it weighed?

A. By the weigh master of the Omaha Grain Exchange, or a weighman.

Q. Is that weighed by anyone connected with the Updike Grain Company? A. No sir.

Q. You have nothing to do with the weighing?

157 A. No sir.

Q. That is the official weight?

A. That is the official weight.

Q. If you sell a carload of grain that is sold "Omaha terms", that including Omaha weights, who weighs it?

A. The same party, the weigh master.

Q. So he attends to the weighing in and the weighing out of grain that is bought and sold on Omaha terms?

A. Yes sir.

Q. The inspection of this by the Omaha Grain Exchange, does that take place down there?

A. Not right at the elevator, only in case of re-inspection; Where a grade is found different in one part of the car than in another.

Q. In the event that you call for a re-inspection, then the Grain Exchange sends a man down there? A. Yes sir.

Q. That amounts to a re-examination? A. Yes sir.

Q. Now how many unloading tracks have you adjacent to this elevator? A. Unloading tracks—two.

Q. Are they separate and distinct from the loading tracks?

A. Yes sir.

Q. So you can be unloading on two tracks at the same time; and can you also be loading at the same time?

A. Yes sir.

Q. How many tracks have you to load out upon?
A. Well,—two.

158 Q. So you could be unloading on two tracks, and loading on two tracks at the same time? A. Yes sir.

Q. How do the cars loaded with grain reach that elevator?

A. Well, through the tracks of the Union Stock Yards Company.

Q. Who places them on the tracks adjacent to the elevator?

A. A Union stockyards engine.

Q. They are switched to the elevator then by the Union Stock yards? A. Yes sir.

Q. The Union Pacific is not able to place a car adjacent to the elevator? A. No sir.

Q. Are any of the other railroads?

A. No sir, it is all done by the Union Stock yards.

Q. Where is the transfer track on which the Union Pacific places cars intended for your elevator?

A. Well, it connects with the Union stock yards tracks down about a mile I should judge it is—or about three quarters of a mile from the elevator.

Q. Which way? A. South.

Q. Have you ever been to that transfer track?

A. Yes sir.

Q. So you know where it is located? A. Yes sir.

Q. Well, now what cars are placed on that transfer track by the Union Pacific?

A. Well, all cars of freight and merchandise I presume, of all kinds, coming in destined for South Omaha.

159 Q. What I mean is, do they place on that transfer track cars intended for other industries besides the Updike Grain Company? A. Yes sir.

Q. What is the fact as to whether livestock is placed there, do you know?

A. Well, I really don't, I am not familiar with that.

Q. You don't know whether any livestock is placed there or not? A. No sir, I don't know.

Q. What you call dead freight is placed there, however, for other industries? A. Yes sir.

Q. And then from that point the stockyards picks up the cars and brings them to your elevator—those destined to you?

A. Yes sir.

Q. In which direction do the tracks run adjacent to your elevator? A. Practically north and south.

Q. Then the loaded cars when switched in by the stock yards Company, are placed on which side of your elevator?

A. Placed on the east and west sides of the elevator.

Q. Well, do they run north of your elevator?

A. Yes sir.

Q. How do you get them to your elevator?
A. We pull them down with a car puller.
Q. Your men have a pulley and tackle and rope and so on?
A. Yes sir, we have our puller.
Q. So the men there pull them down to the elevator as you want to unload them? A. Yes sir.
160 Q. It is slightly inclined there—the track?
A. Yes sir, it is a gravity track, so they run—
Q. During the year 1906 and 1907, when you were receiving these cars off of the Union Pacific, do you know what length of time was consumed by the Updike Grain Company in the unloading of these cars after they were placed on the track adjacent to the elevator?
A. Well, from 20 minutes to 10 hours.
Q. What would you say was the maximum—that is the longest time that intervened between the time a car was placed on your track adjacent to the elevator, and the time you had it unloaded and shoved out of the elevator—what is the longest time it ever took? A. 10 hours.
Q. Why this difference between 20 minutes and 10 hours?
A. Well, the Union Pacific cars may have been on the rear end of the string and come in last.
Q. How long a string of cars can you place there?
A. Well, 26 on each track.
Q. What is the largest number of cars that you can unload there on any one track in a day of 10 hours? A. 26.
Q. You can empty a track in a day of 10 hours?
A. Yes sir.
Q. And after a car—the head of the string—has been made empty, what is done with the empty car?
A. It is pulled out and taken away.
Q. You and your employes, what do you do with it?
161 A. We simply pull them outside the house and they are taken away by the engine.
Q. By a stockyards engine? A. Yes sir.
Q. When one has been emptied and shoved away, you pull another one down? A. Yes sir.
Q. And so on, the process being kept up? A. Yes sir.
Q. Now, during this period of time, when you made a Union Pacific car empty, a car that had arrived over the Union Pacific, and was owned by the Union Pacific, what was done with that car after it was made empty?
A. It was pulled out in the regular way.
Q. By whom?
A. By us, it was pulled out of the elevator.
Q. Then what?
A. The stockyards engine took it out, and I presume delivered it.

Q. What directions if any did you give the stockyards company as to the disposition to be made of that Union Pacific car?

A. I gave them a switch list each evening, each night, ordering those cars delivered in case we were not going to use them.

Q. Well, if it was a Union Pacific car, did you ever retain that car?

A. Not a Union Pacific car—those we have in use in shipping, we have retained them at times.

Q. To load out to some Union Pacific point—to Fort Riley, Kansas, for instance?

162 A. To Fort Riley, yes sir.

Q. During what period of the day would the stockyards Company place those loaded cars on your track?

A. Usually at night—usually filled our tracks at night.

Q. So as to be ready for the morning? A. Yes sir.

Q. What is the fact as to whether or not those cars placed there during the night would be all unloaded during the day?

A. They are generally—or nearly always were.

Q. Unloaded during the day? A. Yes sir.

Q. Then at night, what did you do in the way of making out a switch list?

A. I would order the empties delivered that I wasn't going to use the following day to reload.

Q. Who would the switch list be delivered to?

A. To the Union stockyards.

Q. Now, what efforts, if any, did you make during this time to get these Union Pacific cars back to the Company within the 48 hours period, or as nearly as you could?

A. Well, every effort possible—that is, we unloaded them promptly.

Q. What would you do in the way of asking or requesting or directing the switching of such cars?

A. At times when we were very busy, and had lots of grain to unload, I had an understanding with the yard master that Union Pacific grain was to be set first to be unloaded.

Q. What about the disposition of the car when made empty?

A. Well, we had an agreement or understanding rather, with the stock yards company that they were to be
163 handled promptly. I think Mr. Kuhn wrote a letter to that effect.

Q. Did you ever talk with the crew or the yardmaster to hasten the disposition of these cars? A. Yes sir.

Q. To get them back as soon as you could? A. Yes sir.

Q. If a car came in over the Union Pacific loaded with grain and was unloaded at your elevator, if it was a Burlington car, a Rock Island car, or a Milwaukee car, what was done with that when it was unloaded?

A. Well, I presume though I am not certain—

Q. I want to know what you know about it.

A. We emptied it in the regular way—we had nothing further to do with it.

Q. What did you do when you emptied it?

A. We pulled it out and turned it over to the stockyards.

Q. What did they do with it—

A. I don't know.

Q. Did you during that time, unload cars belonging to foreign roads, east having no lines in South Omaha?

A. Yes, sir.

Q. What did you do with those?

A. Coming in over the Union Pacific?

Q. Yes sir.

A. At times we loaded them out to points east and at times they went back empty. It depended on how badly we needed cars.

Q. Did you have there at that time a copy of this circular that had been issued by the stock yards and to which Mr.
164 Brady's attention was called this morning, did you have that there at the elevator, a copy of that?

A. Yes sir, I think I did.

Q. Did it have this provision down here (reading from the circular) "Foreign cars received from the U. P. R. R. Co., may be delivered, loaded as routed"?

A. Yes, sir.

Q. You were familiar with the circular, were you?

A. Yes, sir.

Q. You say you have been down to this transfer track on which cars are set by the Union Pacific that are afterwards to be distributed by the Stock Yards Company? A. Yes sir.

Q. Does the number of cars that are received by you there at your elevator vary from time to time? A. Yes sir.

Q. Sometimes you are rushed and sometimes not rushed?

A. Yes, sir.

Q. Sometimes the volume of traffic is very heavy?

A. Yes, sir.

Q. During this time did you have any trouble to get cars, that had come into Omaha or South Omaha intended for the elevator, up to the elevator, or trouble to get cars away from there? A. Yes sir, we did, sometimes.

Q. Did you ever go down to the transfer track to find out what was the matter? Whether or not the cars could be got on to the transfer track and got up there?

A. Yes sir, I did.

Q. How many times did you do that?

165 A. Well, I am not positive, I couldn't say positively, but perhaps a half a dozen.

Q. Well, now what was the condition there, what did you find? A. I often found it pretty badly congested.

Q. What do you mean by that?

A. Well, the track would be full.

Q. Were there other cars there that could not be placed on this transfer track?

A. Yes sir. There was times when there would be empty cars we could not dispose of on account of the transfer track of the Union Pacific being full.

Q. I believe you said the cars intended for other industries besides your elevator were placed on this same transfer track? A. Yes sir.

Q. Other industries—I believe there are no other elevators down there? A. Other industries, yes sir.

Q. But there are other industries in South Omaha that receive goods in carload lots? A. Yes sir.

Q. Grain coming in over the Union Pacific that is intended for industries on the line of the Great Western were also placed on this transfer track, were they not?

A. Sometimes on that track and sometimes—there is another track there, I think for Great Western grain.

Cross Examination

By Mr. Rich:

Q. Did you keep a record at the elevator of the cars, as they came in during the period covered by your bills,

166 1906 and 1907? A. A record of the cars?

Q. Yes. A. Unloaded?

Q. Loaded and unloaded? A. Yes sir.

Q. A daily record? A. Yes sir.

Q. Did you keep a record of the time it took you to unload those cars?

A. Well, our records would show the time they were unloaded; they would not, however, show the time that they were set, I don't think, but our record will show the time they were unloaded.

Q. Well, you say they were always set in the night time?

A. As a rule, yes sir.

Q. Some one down at your office makes a record of the numbers of all cars that are set there either for loading or unloading on your track? A. Yes sir.

Q. And you have that record down at your office?
A. I think we have.
Q. And you have such a record for 1906 and 1907?
A. Yes, sir.
Q. Then would that record show the time when you unloaded each particular car? A. It would show the date.
Q. It would show the date? A. Yes sir.
Q. But it wouldn't show the time of the day?
A. Not the time of the day, no.
167 Q. Then would it show when the stock yards took that particular car off your track? A. No sir.
Q. It would just simply show that you had unloaded it, then you would shove it down where the stock yards would come and get it? A. Yes sir.
Q. Will you bring that record here showing the cars received from the Union Pacific, or over the Union Pacific lines, both foreign and cars owned by the Union Pacific, from June 27th, 1906 to December 4th, 1907?
A. I can bring it, but it will be mixed in with the other cars.
Q. But it will show Union Pacific cars? A. Yes sir.
Q. And it will show what cars came over the Union Pacific?
A. Yes sir.
Q. You have a record at your office, have you, of those cars, Union Pacific cars, which were received and unloaded by you and for which the elevation allowance was refused on account of their not being returned in 48 hours?
A. No sir, not at our office.
Q. You haven't that down at your office? A. No sir.
Q. Does the Updike Company have an office uptown?
A. Yes sir.
Q. And who is in charge of that office?
A. Well, I guess Mr. Updike is in charge of the uptown office.
168 Q. There is no general manager or superintendent in charge of that office?
A. Well, I don't know exactly—I couldn't tell you who is in charge.
Q. Would the billing that came in with the cars, the bills of lading, be delivered at the elevator or at the uptown office in Omaha? A. At the uptown office, I think.
Q. What written evidence did you receive at the elevator of where the car came from?
A. We received what we call a "notice of shipment", or "notice of arrival", from the South Omaha freight office.
Q. Did you keep those?
A. No, those are used on an out billing—biling out.

Q. They are used in billing out?
A. They are used by the transit inspection department.
Q. To whom do you surrender or deliver them?
A. To the transit inspection department—Mr. Fisher's office.
Q. Will you bring what records you have of the receipt of cars covering this period, the numbers, time they were unloaded and so forth—can you do that this afternoon?
A. I think I can. I think I can get them; I think we have all our records there; I will bring what we have.
Q. Can you tell the jury on what cross street or what lettered street your elevator is located?
A. It is about "K" street.
Q. About "K" street?
A. Yes sir, between "J" and "K", I would say.
169 Q. And opposite or near what lettered street is the connection between the stock yard transfer track and the Union Pacific track—Union Pacific main line track.
A. Well, I should judge it is near "O" street, although I am not positive.
Q. Then the length of the track, or the distance that the stock yards would have to pull cars destined for your elevator, would be from "O" street back to between "J" and "K" street?
A. Yes sir.
Q. From "K" street to "O" street would be, "K", "L", "M", "N", "O", five blocks. A. Yes sir.
Q. So that elevator of yours is five or six blocks up the transfer track from its connection with the Union Pacific?
A. Yes sir, I should judge so.
Q. And your elevator is located on a direct track from a connection with the Union Pacific up to your elevator?
A. Yes sir.
Q. Is there any weighing done in transit between the time those cars are set on the stock yards exchange track and hauled five blocks up to your elevator? A. No track weighing.
Q. No track weighing? A. No sir.
Q. Do you know where the stock yards places cars that it takes back to the Union Pacific direct?
A. Yes sir, I know about where they place them, I think.
Q. Where do they place them?
170 A. On the Union Pacific transfer track.
Q. And is the Union Pacific transfer track the same as the stock yards transfer track you have been telling about?
A. It is a joint track.
Q. Does the stockyards take the cars back to that track from which they receive them from the Union Pacific, or to another track a little further south—a half block further south?

A. I think they take them to the delivery track. I think there is one track used for receiving freight and the other for delivering.

Q. Then in taking them back from the Updike elevator, empty, to deliver them to the Union Pacific, the pull is only five blocks—I should judge between five and six blocks?

A. I think so.

Q. Do you know what those blocks are in South Omaha—about 300 feet?

A. I guess they are—they are a good size—about that.

Q. About 300 feet? A. Yes sir.

Q. So that your elevator is located between 1500 and 2000 feet north of where the stock yards transfer track joins with Union Pacific main line? A. It is all of that.

Q. In delivering a car then, taken from the transfer track, as left there by the Union Pacific, and pulled up to your elevator, it is something like 1500 to 2000 feet up to your elevator?

A. Yes sir, it is that far anyhow.

Q. And about the same distance back to where the stock yards delivers to the Union Pacific?

171 A. I think so.

Q. Now, you have two tracks for unloading—are they both on the same side of the elevator, or on opposite sides of the elevator? A. They are on opposite sides.

Q. And how many cars can you unload at the same time on each of the unloading tracks? A. Two.

Q. So you can unload a car at the same time on each of the tracks? A. Yes sir.

Q. How do you unload your cars?

A. With a shovel run by electric power.

Q. And those shovels handled by men? A. Yes sir.

Q. After a car is set at an unloading place, before you begin to unload, how long does it ordinarily take to empty a car?

A. About 20 to 30 minutes.

Q. That is the average time?

A. That is the average time, yes sir.

Q. You can unload a car quicker than that, can't you?

A. Yes sir, if necessary.

Q. How many men does it take to unload a car?

A. Well, we generally use two—in rush times we use more than that—three.

Q. Can three men unload a car quicker than two?

A. Yes sir.

Q. How long does it take three men to unload a car?

A. Three men will unload a car in 20 minutes.

172 Q. Then if you had three men to each car you could unload four cars each 20 minutes? A. Yes sir.

Q. And you could unload 20 cars an hour (12?)

A. Yes sir.

Q. And your loading does not in any way interfere with your unloading? A. No sir.

Q. What do you pay those men that unload the cars?

Mr. Smith: That is objected to as immaterial.

Objection sustained. Defendant excepts.

Q. How many cars do you ordinarily receive and unload per day during 1906 and 1907 at your elevator?

A. You mean the average?

Q. The average.

A. Well, I presume on an average it would be about 20 cars a day.

Q. And if it was absolutely necessary you could have unloaded those cars in one hour, had they been all punched near together at the elevator? A. Yes sir.

Q. Then you ordinarily unloaded each day all of the cars that had been set on the unloading tracks by the Stockyards the night before? A. Yes sir.

Q. Did the stock yards, if it had cars, deliver them to you through the day for unloading? A. At times, yes sir.

Q. Well, would it deliver cars, loaded cars that it had for you and when would it not?

173 A. Well, when we were in shape to handle them, when we were idle, and there was cars on their tracks, they would deliver them to us.

Q. Then if you were in shape to receive more loaded cars and the stock yards had them on the exchange track, they would deliver them to you on your request? A. Yes sir.

Q. When you had 20 cars on your unloading track, and there was no particular hurry, what time did you begin to unload those cars in the morning? A. Seven o'clock.

Q. In the ordinary course of unloading it would occupy you most of the day, would it not, in unloading those 20 cars?

A. No sir, we generally do our unloading the first thing; we would go at it and clean them up.

Q. What time would you clean up your 20 cars?

A. Oh, as a rule by ten o'clock.

Q. Then you would push those cars out so the stockyards could come and get them? A. Yes sir.

Q. But you didn't give the stock yards a switching list at 10 o'clock or 11 o'clock when those cars were ready for the stock yards, but you waited until evening and gave them a completed switching list of everything they were to take out?

A. Yes sir, as a rule.

Q. So that if you finished by 10 o'clock those cars would stand there from ten o'clock until noon, and from that time

until night? Until you delivered the switching list to take them out.

174 A. Not always, at times we had switching done at noon. We would be getting in an average supply of empties and loads and the stock yards very often took those cars and delivered them at noon—very often.

Q. If you didn't have any new cars to get in, and had a string of unloaded cars on your tracks, you let them stand until evening before you gave them a switching list in the evening?

A. Unless I gave them a verbal list—one over the telephone to the foreman.

Q. But you say ordinarily you didn't give them any switching list until evening, that was the general practice?

A. That was the general practice as to a written list.

Q. Well, would they perform work for you on a verbal order? A. Yes sir.

Q. Well, that was put in a permanent record, however, wasn't it?

A. I think it was, that is by the stock yards company, they have a record of all switching done.

Q. Well, if you gave a verbal order to move some cars at noon, would you include that in your switch list that you handed them in the evening?

A. No sir, that wouldn't be necessary.

Q. Well, then, why did you give them a written switching list sometimes, and a verbal switching list at other times?

A. Well, at times we wouldn't have enough of work to be done the previous evening to keep us going all the following day. Grain was arriving at most any hour, grain of ours, and if the stock yards company had only in their possession 20 cars this evening, and we could unload 50 tomorrow, there would be more grain arriving—tomorrow forenoon, we would have them set in the afternoon; I would give their yard fore-

175 man instructions to set the grain for me, and we would unload it during the day.

Q. But as a general rule, you waited until evening and then gave an order to move all the cars—empties and loads?

A. That was the general rules, yes sir.

Q. You say you think you had this stock yards circular at the elevator? A. Yes sir.

Q. Did you do anything with reference to it?

A. What is it?

Q. Did you do anything with reference to the circular, in loading cars?

A. I abided by the circular—it was necessary that I should.

Q. How did you get cars for loading to points east—what was your procedure?

A. Well, I ordered them from the different roads, as we needed them for loading.

Q. If you were going to ship out over the Northwestern, you ordered so many cars from the Northwestern?

A. Yes sir.

Q. And the same procedure with reference to any road over which you intended to ship? A. Yes sir.

Q. How did you come to load foreign cars that belonged to a road that had no entrance into Omaha, or switching connection; how did that arise?

A. They were in our possession and that was our privi-
176 lege.

Q. That is, if you unloaded a B & O car that came in over the Union Pacific, and you wanted to ship to some eastern point, you just reloaded that car?

A. We reloaded the car, yes sir.

Q. Did you unload all grain that came in over all roads?

A. Yes sir.

Q. At this elevator? A. Yes sir.

Q. So that this allowance of a cent and a quarter or three quarters of a cent per hundred pounds had nothing to do with whether you would unload a car or not?

A. I think not.

Q. If grain came in over the Burlington, Rock Island, Northwestern or any other road, you unloaded it into the elevator just the same as you unloaded grain that came in over the Union Pacific? A. As a rule we did.

Q. Well, as a rule, did you always do it?

A. With the exception of a few cars that may have been reconsigned for some reason—very few, though.

Q. The general rule was to unload all of those cars?

A. Yes sir.

Q. Did you weigh the grain privately at your elevator, or was that done entirely by this inspector or representative of the association?

A. Done entirely by the Omaha Grain Exchange; we had nothing to do with it.

177 Q. During the year 1906 and 1907, did the Omaha Grain Exchange have a man that it put down there to weigh the grain, or was the grain weighed by some employee of the Updike Grain Company, acting as a representative of the Grain Exchange?

A. As I understand it, the weighing is always done by the Grain Exchange.

Q. Wasn't done by an employee of the Updike Company?

A. No sir.

Q. Do you have a line of elevators out in the State of Nebraska—does the Updike Company?

A. Yes sir, the Updike Company has.

Q. Along what line of railroad are those elevators located?

A. Well, I think on the Burlington and Northwestern—I couldn't tell you positively, because I am not familiar with that part of it.

Q. And you received grain constantly over all of those other roads? A. Yes sir.

Q. Over what roads did you receive the most grain from Nebraska points?

A. Well, I couldn't tell you that—I wouldn't be in shape to say.

Q. Did the Updike people have a line of elevators on the Union Pacific?

A. I don't think so—I don't know—I am not familiar with that.

Q. Well, you know this, don't you, that you received more grain over the Burlington than you did over the Union Pacific?

A. Yes sir, I think we have.

178 Q. And did you receive about an equal amount of grain over the Rock Island or the Northwestern that you did over the Union Pacific?

A. No sir. We don't receive a great deal of grain over the Rock Island, I don't think it would be as much.

Q. Can you give the jury any idea of the proportion of the entire grain received by you from all roads that you received over the Union Pacific?

A. The percentage of the entire amount?

Q. Yes, what part of that came over the Union Pacific?

A. I would say ten per cent.

Q. And 90 per cent of the grain that went into your elevator came over other roads? A. Possibly, yes sir.

Q. And you unloaded that into the elevator, and handled it in the same manner that you did the grain coming over the Union Pacific road? A. Yes sir.

Q. What else did you do with grain after it got into your elevator—anything? A. Put it in bins is all.

Q. Did you dry it? A. No sir.

Q. Have no process for that? A. No sir.

Q. Did you clean it?

A. When it needed it we cleaned some of it.

Q. What part of it was cleaned—what part of it did you put through that process?

179 A. I couldn't tell you.

Q. You have no idea? A. No sir.

Q. Well, 5% of it or 90%?

A. 5% would be nearer than 90%.

Q. Would be nearer? A. Yes sir.

Q. Did you mix the grain in any manner in shipping it?

A. At time we have mixed it.
Q. What was the object of that?
A. Well to—for purposes of blending I suppose—getting a uniform sample.
Q. And making the grain more salable or more valuable?
A. I couldn't say as to that.
Q. You don't know whether that did that or not?
A. No sir, I couldn't say.
Q. How many years experience have you had as a grain man? A. Ten years.
Q. Well, now, you don't know then what they blend it for?
A. I couldn't speak from—I never have handled that end of it. I simply have handled the terminal elevator end of it.
Q. You can't tell what they mix it for?
A. No sir, not from the stand point you ask.
Q. But during the year 1906 and 1907, the period for which your claims are filed, you did clean, mix and blend grain that came in to the Updike elevator?
A. Some of it, yes sir.
Q. You say the capacity is five hundred thousand bushels? A. Yes sir.
180 Q. The capacity of your elevator? A. Yes sir.
Q. And you use that elevator for storage purposes?
A. Well, I can't say as we do any handling—we use it more for transfer.
Q. Use it for transfer? A. Yes sir.
Q. But there were times when you did store the grain and hold it for a period? A. No great length of time, no sir.

The noon hour having arrived, a recess was taken until 2 o'clock P. M. at which time the witness Lawrence Kearney resumed the stand, and his cross examination by Mr. Rich was proceeded with as follows:

Q. Mr. Kearney, during the years 1906 and 1907, did the Union Pacific keep a clerk or an employee down there at your elevator? A. Yes sir, I think they did.
Q. To keep check on these Union Pacific cars?
A. Yes sir, I think so.
Q. What did he do down there?
A. Well, as I understood him he checked the arrival of the car, the time it was sent on our unloading tracks, and the time it was unloaded by us.
Q. By your company? A. Yes sir.
Q. He did that on each and every car that came in off the Union Pacific?

181 A. Yes sir, I think that was the intention—yes sir.
Q. He kept an account of the time it was placed on your unloading track? A. Yes sir.
Q. And the time it was unloaded at your elevator?
A. Yes sir.
Q. Did he keep any further or additional memorandum?
A. Not that I know of.
Q. The time it was placed—he didn't keep record of the time it was placed on the transfer track, or the time it was returned to that transfer track by the stock yards company?
A. I don't think so.
Q. But simply the time it was placed at your elevator, and the time you unloaded it?
A. Yes sir, I think that was all.
Q. You don't know why he was there, or the purpose of his being there? A. No sir.
Q. You simply know what he did there? A. Yes sir.

Witness excused.

182 John A. Kuhn is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed P. Smith, he testified as follows:

Q. What is your full name? A. John A. Kuhn.
Q. You are in the employ of the Updike Grain Company?
A. Yes sir.
Q. In what capacity? A. In charge of transportation.
Q. How long have you been with that company?
A. Three years.
Q. What was your business before you went with the Updike Grain Company? A. Railroad business.
Q. With what road?
A. The Chicago & Northwestern, or rather the Fremont, Elkhorn & Missouri Valley, which was the western branch of the Northwestern.
Q. In what department? A. Freight department.
Q. How long were you thus employed?
A. Well, I was connected with the Northwestern for twenty odd years.
Q. You are familiar with the movement of grain down here at the Updike elevator? A. To an extent.
Q. Do you know how the cars are handled and placed there? A. To an extent, yes.
Q. Did you have anything to do with the presentation of the claims of the Updike Grain Company against the
183 Union Pacific Railroad Company for elevation allowance accruing on cars unloaded during the years 1906 and 1907?

A. I did.

Q. That was on cars unloaded at this elevator at South Omaha? A. Yes sir.

Q. What is the fact as to whether any of those claims were paid? A. Not any of them.

Q. Did the Updike Grain Company receive from the Union Pacific any allowance on any grain that was received over the line of the Union Pacific and unloaded at this elevator at South Omaha during the years 1906 and 1907?

A. Not a penny for unloading.

Q. Are you familiar with the character of the cars that were received off of the Union Pacific and were unloaded at this elevator? A. Yes sir.

Q. As to ownership? A. Yes sir.

Q. What were they?

A. Cars of all roads of the United States, practically.

Q. Do you know Mr. Lane? A. I do.

Q. Of the Union Pacific? A. Yes sir.

Q. What official position does he occupy?

A. I understand First Assistant General Freight Agent is his title.

Q. Is that the Lane whose name appears as one of the parties who issued this Tariff 888?

184 A. Yes sir.

Q. And 904? A. Yes sir.

Q. During the years 1906 and 1907 he was First Assistant General Freight Agent of the Union Pacific here at Omaha?

A. So I understand.

Q. During the years 1906 and 1907, did you have any conversation with Mr. Lane relative to the application of these tariffs 888 and 904 to foreign cars belonging to eastern roads having no connection in South Omaha, when those cars were unloaded at this elevator?

A. I did with reference to the first circular.

Q. You mean 888? A. Yes sir.

Q. When was that conversation?

A. I cannot give you the exact date, but shortly after its effectiveness.

Q. Where was that conversation?

A. Over the 'phone.

Q. Were you discussing the provisions of this tariff 888?

A. Yes sir.

Q. The one which makes provision of a cent and a quarter allowance? A. Yes sir.

Q. Please tell the Court and jury what was said by both of you in reference to that?

Mr. Rich: The defendant objects to that as incompetent irrelevant and immaterial, no time being fixed.

Objection overruled.

Defendant excepts.

185 A. There is a provision in that circular to the effect that the cars must be returned to the Union Pacific Railroad Company within forty-eight hours in order to secure this elevation charge. At that time we were receiving a large number of foreign cars at the elevator, loaded with grain, from off the Union Pacific Railroad. At that time there was an arrangement between the railroads under which they paid one another a per diem, which in effect amounts to a rental of so much per day—I think it was fifty cents per day at that time. At the same time we were loading grain for the east, south and all territory. We were unloading and loading. I suggested to Mr. Lane that the provision in his circular would prevent us loading these foreign cars in their home direction; that at the same time the Union Stock Yards Company had in effect a circular which practically gave permission to load these foreign cars to the home road, which I judged was for the purpose of relieving them of the per diem.

Q. In speaking of the circular the Union Stock Yards Company then had in effect, do you refer to this circular marked "Exhibit C", attached to the answer in this case?

A. Yes sir.

Q. And what did he say to you and you to him?

A. I suggested that it would relieve us, or at least relieve them of the per diem, and at the same time enable us to load these cars east, and avoid going through the motions of having that empty car taken from our elevator and switched back to the Union Pacific, and then possibly switched back to the elevator and reloaded to the east. Mr. Lane replied that—

186 Mr. Rich: Let me ask the witness a question: Was Mr. Lane's reply to you along the line of a change or a variation from the published tariff, or an exception to the provisions of the published tariff?

Mr. Smith: We object to that as not proper cross-examination and not a proper question to put at this time. The answer of the witness will disclose what it was.

The Court: The objection may be sustained.

Defendant excepts.

Mr. Rich: The defendant also objects to any further answer to the last question put by Mr. Smith, as incompetent, irrelevant and immaterial, for the reason that if what Mr. Lane said was a variation or an exception with reference to the pro-

visions of the published tariff, what he said would not be binding and would be illegal and unlawful.

Objection overruled.

Defendant excepts.

A. (contd) Mr. Lane's reply was that we should continue to load these cars towards the home line, relieving them of this other movement; that it would appear ridiculous to go through the motions of switching an empty car back to the Union Pacific and then switching it back to our elevator.

Q. Did you say anything to him at that time, or ask him what effect it would have upon your claim for this elevation allowance if they were loaded east?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial, for the reason that any answer that Mr. Lane might make would not be binding upon the Union Pacific.

187 Objection overruled. Defendant excepts.

A. He replied that he would make no exception to the application of the circular.

Q. I don't know as I understand what you mean?

A. He replied that if we loaded these cars towards the east, going towards the home line, that that would not vitiate the effectiveness of the circular, so far as the collection of the elevation on our part was concerned.

Q. What did he say in that conversation as to whether or not, if you did that, you would or would not receive the elevation allowance the same as if it had gone back to the Union Pacific?

Mr. Rich: We object to that as being incompetent, irrelevant and immaterial and not binding on the defendant.

The Court: I think he has practically answered the question—I think his answer is plain.

Q. Did the company thereafter continue to load those cars east? A. Our company did, yes sir.

Cross Examination

By Mr. Rich:

Q. Mr. Kuhn, has anyone else ever paid these elevation charges to the Updike Company—any railroad?

A. For what time?

Q. For the period you have filed these claims for?

A. No sir.

Q. Have they paid them since that time?

A. For shipments made since that time, yes sir.
Q. And you have received your money? A. Yes sir.
188 Q. Did any other railroad agree to pay these elevation charges for grain unloaded at your elevator?

Mr. Smith: That is objected to as not proper cross-examination, irrelevant, immaterial and incompetent.

Objection sustained. Defendant excepts.

Q. Have you an agreement with any other railroad company that if you do not succeed in collecting those charges from the Union Pacific Railroad Company that the other railroad companies will absorb them?

Mr. Smith: That is objected to as not proper cross-examination, incompetent, irrelevant and immaterial.

Objection sustained. Defendant excepts.

Q. Did any other railroad company, or all other railroad companies running east from Omaha, have a tariff or a provision of the tariff, covering the period covered by the claims you have filed here, agreeing to absorb the elevation charges of this character?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, not proper cross-examination and not the best evidence.

Objection sustained. Defendant excepts.

Q. What date did you go with the Updike Grain Company?
A. I believe it was January 1st, 1906.
Q. When did you have this talk with Mr. Lane over the 'phone?
A. Sometime immediately after the first circular was issued.
Q. What was the date of the first circular?
A. I believe it was January 1st, 1906.
Q. Had you been loading out foreign cars prior to the time you had the talk with him? A. Oh, yes.
189 Q. Had you put in claims for the foreign cars so loaded during the time—prior to the time of that conversation?
A. Claims against the Union Pacific?
Q. Yes?
A. I believe claims had been presented against the Union Pacific and were withdrawn.
Q. Have those been presented again? A. No sir.
Q. Then you filed no claims against the Union Pacific for elevation on foreign cars, except such cars as were loaded after

the time you had that conversation, that is, and the same being included in the present claims?

Mr. Smith: I object to that as not being what the witness said.

Q. After the publication of this tariff, June 27, 1906, and prior to the time you had your conversation with Mr. Lane, did you file any claims with the Union Pacific for the elevation allowances on foreign cars loaded out by you and not returned to the Union Pacific?

A. The circular, as you state, took effect June 27th, and our conversation evidently took place two or three days from that. Claims were presented once a month, so therefore we would present claims from the date of the effectiveness of the circular June 27, 1906. If there were foreign cars loaded at that time all well and good.

Q. Did you say those claims were rejected?

A. No sir.

190 Q. They were withdrawn?

A. No sir, you misunderstood me.

Q. You used the word "withdrawn", did you not?

A. Claims presented, for instance, for elevation during the years 1905 or 1906, prior to the effectiveness of the circular, were withdrawn.

Q. You had filed claims that arose prior to June 27th, 1906?

A. Yes sir.

Q. Those were withdrawn? A. Yes sir.

Q. Where was Mr. Lane when you got him on the telephone?

A. Apparently in his office.

Q. You called up his office, did you?

A. Yes sir.

Q. Where were you? A. At my office.

Q. Did you make any written memorandum of that conversation at that time?

A. No sir, but I verified it in Judge Baldwin's office, and Mr. Lane verified it in the presence of yourself, Mr. Munroe, Mr. Hancock, Mr. Anderson—and I believe yourself and Mr. Updike some months afterwards.

Q. Do you mean to say that he verified the conversation in the words you testified to, or to having had a conversation with you? A. Yes sir.

Q. That he had the conversation with you?

A. Yes sir.

191 Q. But he didn't verify the conversation in the words you have given to Mr. Smith today?

A. Possibly not verbatim, but the effect was the same.

Q. Well, that is your conclusion. Now, when was the Stock Yards circular issued?

A. I don't know—it was in effect the latter part of—

Q. —May 1st, 1906—

A. All right.

Q. Let me ask you if at the time you had the conversation with Mr. Lane you did not call his attention to the Stock Yards circular?

A. You ask whether I did call his attention to it?

Q. Yes.

A. Well, the conversation took place some time ago—I think I did.

Q. Now, let me ask you if you did not ask Mr. Lane what he was going to do in view of the provisions of the Stock Yards circular, and let me ask you further if he did not reply: "Well, if that is effective and legal I don't know how we are going to come across". Now let me ask you if those were not the words he used?

A. I think not. If there had been any question about the circular or the collection of the elevation we should have asked the Union Pacific to remedy their circular, or should have endeavored to take steps to—

Q. What did he say about the Stock Yards circular?

A. I don't recall that he said anything particular.

Q. Then you got no answer from him at all concerning the Stock Yards circular?

A. I do not recall—he may have made an answer. All
192 I do know or do recollect is the fact that Mr. Lane notified me very emphatically that the loading of foreign cars to home roads would not vitiate the effectiveness of the circular, or in other words, the collection of the elevation on our part.

Q. Of what circular?

A. The Union Pacific circular.

Q. It had nothing to do with the Stock Yards circular?

A. What had nothing to do with it?

Q. Mr. Lane's conversation?

A. I think I mentioned it to him, and I am pretty sure I told him that the Stock Yards circular permitted that—apparently it was with the sanction of the Union Pacific.

Q. Now you think you said that to him?

A. Yes sir, I think I did. This took place two or three years ago.

Q. What do you now think Lane said?

A. I said that Mr. Lane said we could collect our elevation on cars that went east loaded toward the home road.

Q. Then you don't think he made any reply to you concerning that provision or that exception in the Stock Yards circular?

A. I do not recall what he said, only he said it would be ridiculous to go through the motion or having the foreign cars switched back to the Union Pacific and then back to the elevator for loading east, and the Union Pacific, in the meantime, paying the per diem.

Q. You cannot fix the time when he said that—whether it was one or two or three days after the Union Pacific circular became effective?

A. I judge it was very close to it because I paid close attention to the circular.

193 Q. You knew that the tariff was going to be issued?

A. I didn't know it was going to be issued until I got it.

Q. And you had been keeping a check on different cars before the issuance of that circular for the purpose of presenting a bill?

A. No sir.

Q. Did you present a bill for elevation allowances before the issuance of the Union Pacific circular?

A. Claims were presented by the Updike Grain Company before I came with them for a period of a year, or possibly more, and they were withdrawn by the Updike Company.

Q. You went with the Updike Company about when?

A. January 1st, 1906.

Re-direct Examination

By Mr. Smith:

Q. Those would be claims for elevation prior to the publication of their tariff 888?

A. Yes sir.

Q. And there was no published tariff, prior to that time, which provided for an elevation allowance?

A. No sir.

Q. Claims that were made for that were afterwards withdrawn?

A. Yes sir, they were. They were made on the assumption that if others were getting the elevation we should get it.

Q. But you never got it?

A. (No response.)

194 Re-cross Examination

By Mr. Rich:

Q. What did you do with the foreign cars that came to your elevator from the Union Pacific? Did you always load them out? A. No sir.

Q. What did you do with them?

A. Some of them were returned to the Union Pacific, others were loaded.

Q. What proportion of the foreign cars were loaded out?

A. I could not say as to that without going into the records.

Q. Can you give an impression at all?

A. A large proportion, I would say.

Q. Then after you had that talk with Mr. Lane you never made any pretense of returning the foreign cars to the Union Pacific?

A. In some instances we returned them when we did not need them—when they were not loaded. We tried to favor the Union Pacific by returning all those cars we possibly could.

Q. You thought that was a favor, did you, to the company?

A. Yes sir.

Re-direct Examination

By Mr. Smith:

Q. I believe you said, in answer to a question by Mr. Rich, that you said to Lane or he said to you that it was a favor to the Union Pacific to load those cars east? Why was that true?

A. Under the per diem arrangement I mentioned, the Union Pacific were responsible to the owner of the car at the rate of fifty cents per day while it was in their possession.

Q. And after it was loaded east, loaded by you and sent out, say over the Northwestern, the Burlington or the Rock
195 Island, did the per diem of the Union Pacific on those foreign cars then cease?

A. Yes, sir.

Q. And the road in whose possession it was, as a loaded car, had to pay that? A. Yes sir.

Q. For that reason the Union Pacific was willing and anxious that you should load them and send them east?

A. Yes, sir.

Re-cross Examination

By Mr. Rich:

Q. It was also a favor to the Updike Company to load those cars with grain and send them east?

A. I suppose it was sometimes, when the volume of traffic was east of the river in preference to the west.

Witness excused.

196 George W. Cover, a witness heretofore called, sworn and examined on the part of the plaintiffs, is at this time recalled for further examination on the part of the plaintiffs.

Being examined by Mr. Ed P. Smith, he testified as follows:

Q. Have you got with you now, Mr. Cover, the agreement you referred to in your testimony, relative to cars in switching service? A. Yes sir.

Q. Will you let me see it, please?

A. That is the one effective during the period named—1906 and 1907 (Handing the same to counsel).

Q. You may look at this paper marked "Plaintiffs' Exhibit 6", and state if that is the agreement you referred to in your testimony this morning, as being in effect between railroads in Omaha governing cars in switching service during the time in controversy here? A. Yes sir, it is.

Mr. Smith: I now offer in evidence Plaintiffs' Exhibit 6. The same is received without objection and is read to the Court and Jury by Counsel for plaintiffs.

Plaintiffs' exhibit 6 is as follows:

197 Reclaim per diem Rules Governing Settlement for the Use of Freight Cars in the Omaha, Council Bluffs and South Omaha Switching District, Effective April 1st, 1904. Adopted by Association of Lines Terminating at Omaha, Council Bluffs and South Omaha.

Rule No. 1.

Switching service is the movement of a car to be loaded or unloaded, or the movement of a car between railroads, at a charge for the service rendered within designated switching limits, the road performing the service not participating in the freight rate. Switching service shall be divided into two classes, viz: Terminal Switching and Intermediate Switching.

Rule No. 2.

Terminal Switching is that wherein one road receives from another a loaded car to be unloaded on its track, an empty car to be loaded on its tracks and returned to the delivering road. The road for which Terminal Switching is performed is that road participating in the freight rate nearest to the point within the switching limits on the switching road where car is loaded or unloaded.

The road for which Terminal Switching is performed will allow the Terminal Switching road, upon whose rails cars are unloaded or loaded (or upon private tracks connecting therewith), a reclaim of four (4) days at the current per diem rate,

Rule No. 3.

Intermediate Switching is that wherein one road re-
198 ceives from another a loaded or empty car to be deliv-
ered to another road, the service being performed within the switching limits, the road performing such service not participating in the freight rate.

The road for which Intermediate Switching is performed is that road which tenders a car to the intermediate road. The road for which Intermediate Switching is performed will allow the Intermediate switching road one (1) day at the current Per Diem Rate for each movement of the car, either loaded or empty, whether switch or through service.

Rule No. 4.

In the case of cars loaded at a point within the switching limits to a point within the switching limits the road tendering the car shall pay the reclaim.

Rule No. 5.

If a road performing terminal or intermediate switching rereives an empty car from a connection for loading, and such car is returned empty by reason of cancellation of order or error on part of delivering road, Reclaim may be made against the road making original delivery on the basis of the agreed terminal or intermediate Reclaims.

Rule No. 6.

Whereas, Rule No. 5, of the Car Service Code, provides that delivery is not complete until cars have been accepted by a Car Inspector of the receiving line; and

Whereas, compliance with this rule at many points is impracticable, it is understood and agreed that when cars in bad order are receipted for, such car shall be treated in accordance with the M. C. B. rules, and in addition to
199 this, the receiving line may Reclaim against the delivering line actual Per Diem accruing, not to exceed two (2) days per car at the current Per Diem rate.

Rule No. 7.

In the absence of an agreement to the contrary, a road cannot Reclaim on account of Per Diem paid upon cars loaded with Company's Material for its own use.

(See arbitration Case No. 8, decision rendered by the Arbitration Committee of the American Railroad Association, dated July 2nd, 1903).

Rule No. 8.

An Arbitration Committee of five (5) members shall be appointed by the Chairman, three (3) of whom shall constitute a quorum. All questions arising under these rules may be submitted to the Committee through the Chairman in abstract, which shall briefly set forth the points at issue, and each party's interpretation of the rule on which the claim is based. The Arbitration Committee shall base its decision upon the Local Rules and the abstract submitted and its decision shall govern until changed by the Association. Should one of the parties to the dispute refuse to furnish the necessary information, the Arbitration Committee shall use its judgment as to whether it can properly decide. In case a question shall arise not covered by the Rules, the railroads disagreeing may by mutual consent submit such question to the Arbitration Committee.

Copies of all decisions rendered by the Arbitration Committee shall be sent to the Car Service Officer and Local Agent of the member roads.

200 Q. Now, Mr. Cover, explaining this—if a car comes in over the Union Pacific that is intended for the Nebraska-Iowa elevator, what do you term the Union Pacific—is that the road for which the terminal switching is performed?

A. It is.

Q. And the Burlington is the switching road?

A. Yes sir.

Q. Now this says: "The road for which terminal switching is performed"—that is the Union Pacific in the case I give you?

A. Yes sir.

Q. (Cont.) "Will allow the terminal switching road"—that is the Burlington? A. Yes sir.

Q. (Contd.) "Upon whose rails cars are loaded or unloaded a reclaim of four days at the current per diem rates"—what do you mean by that?

A. Means practically that they have four days free time in which to return the car.

Q. The Burlington road, then, is allowed four days time in which to take that car to the place of unloading and return it?

A. Yes sir.

Q. Now this says: "At current per diem rates". What does that mean?

A. The rate per diem charged varies at different times, as governed by the agreement of the different roads. At that time I think it was fifty cents per day.

Q. If a car comes in over the Union Pacific and is turned over to the Burlington to be switched to the Nebraska-Iowa

elevator, the Burlington gets something for performing
201 the switching service? A. Yes sir.

Q. How much? A. Can't tell you.

Q. Don't know? A. No sir.

Q. Did it get anything further than that in the way of this per diem reclaim?

A. All they got out of the car, I believe, is the switching rate.

Q. When this says "four days shall be allowed" and "reclaim of four days", what do you mean by "reclaim"?

A. They have to pay a rate of twenty-five or fifty cents, according to what the per diem charge is, to the delivering road for the use of that car—for the retention of the car. They are allowed four days reclaim and they can make a counterbill against the delivering road for those four days.

Q. Then the Burlington road has to pay to the Union Pacific road a certain per diem for each day that that car is in the possession of the Burlington while it is switching it to the elevator? A. Yes sir.

Q. If it took eight days they would have to pay eight days per diem? A. Yes sir.

Q. And as a counter charge the Burlington is allowed to bill against the Union Pacific on that?

A. Arbitrarily four days.

202 Q. So if it took it four days to take it down and back, it would be allowed a reclaim of four days and would have to pay a four day per diem? A. Yes sir, exactly.

Q. So one would counterbalance the other? A. Yes sir.

Q. If it took them three days to get it down and back, would they still get their four days reclaim? A. Yes sir.

Q. And would have to pay a three day per diem?

A. Yes sir.

Q. If the per diem was fifty cents a day and they got it back in three days they would be permitted to bill on the Union Pacific for two dollars? A. Yes sir.

Q. And would have to pay a dollar and a half back?

A. Yes sir.

Q. If it took them five days to get it back they would be fifty cents loser, wouldn't they? A. Yes sir.

Q. So it is to their advantage to get that back as soon as possible? A. Yes sir, that is the idea of the rule.

Q. They got that in addition to the switching?

A. Yes sir.

Q. Did you represent the Burlington in making up these rules? A. No sir.

Q. Do you know why the four days clause was put in that Rule 2, as I read it to you?

203 A. The roads centering in any particular locality agree as between themselves as to what is a reasonable time to switch a car, and it is based, as I understand it, entirely on that.

Q. Then in the consensus of the judgment of the roads in Omaha, and those operating those roads, four days was regarded as a reasonable time in which to perform that switching service, therefore they put that in Rule 2? A. Yes sir.

Q. That rule applies to cars loaded with grain, don't it?

A. Yes sir, it specifically states there.

Q. Is there any class of freight to which that four day rule does not refer? A. Livestock.

Q. Livestock is especially—that has to be switched pretty quick? A. Yes sir.

Q. And I understand, then, that Rule 2 was formed after an investigation of the different railroad operatives here, and was the result of their judgment as to the length of time it should reasonably take to switch these cars to the various industries and get them back? A. That is as I understand it.

Q. Those rules have remained effective down to this time?

A. Those particular rules have not. There is a recent issue covering the same amount of reclaim—four days.

Q. Rule 2 in that regard has not been changed?

A. No sir.

Q. And that was in effect in 1906 and 1907?

A. Yes sir.

204 Cross Examination

By Mr. Rich:

Q. Mr. Cover, you say, I believe, that this includes all kinds of freight and cars that come into the City of Omaha, or the switching district in the City of Omaha?

A. That is my understanding of it, with the exception as stated in the rules themselves.

Q. Now, with reference to the switching charge that you would charge the elevator for performing this work—do you know anything about that switching charge?

A. Nothing whatever.

Q. You know nothing about that? A. No sir.

Q. This rule was formulated to cover every car—the longest time that any car might be detained by the switching road, or the switching party to this contract?

A. Not the longest time, as I understand it, but the average time.

Q. But that average time would have to cover the longest time, wouldn't it?

A. No, I would not say the average time is the longest time.

Q. Now, it takes different lengths of time, does it not, to unload different cars? A. Yes sir, certainly.

Q. If a car was delivered to you that took six days to unload, then you would be charged, would you, with two days extra time? A. Yes sir, that is my understanding.

Q. There would be two days against you?

A. Yes sir.

205 Q. And do you mean to say then that this contract did not include the longest time, but only included the average time? A. That is my understanding.

Q. But under this contract there are many instances in which it takes you many days longer than four days in which to return a car? A. Yes sir.

Q. Now, [instance,] will you, some of those exceptions, and the character of the merchandise loaded on those cars?

A. Merchandise?

Q. Or anything?

A. Well, I think as a rule it takes coal, and the coarse commodities of that kind longer in unloading and returning. Shipments of a perishable nature they handle—get the cars back quicker and they are released quicker, but it depends entirely upon the commodity how soon it can be unloaded.

Q. If you received from the Union Pacific a car loaded with a commodity that it is going to take one, or two or three or four days to unload, then you would want at least four days to receive and deliver that car and deliver it back to the Union Pacific? A. Yes sir.

Q. Wouldn't you? A. Yes sir.

Q. And if you received a car from the Union Pacific which would take twenty or thirty minutes to unload, or five or six or ten hours to unload, then with reference to that particular commodity the rule of four days would have no application, would it?

206 A. I don't believe I follow your question.

Q. (repeated) If you received a car from the Union Pacific which would take twenty or thirty minutes to unload, or five or six or ten hours to unload, then with reference to that particular commodity the rule of four days would have no application, would it—as to being reasonable I mean?

A. No.

Q. Four days may be absolutely unreasonable, with reference to something that cannot be unloaded in four days, would it not?

A. The rule, as I understand it, is based upon the reasonable average time to unload all commodities.

Q. All commodities of every kind?

A. Yes sir, the average time.

Q. Now, are you personally familiar with the unloading of the various commodities that are transported by railroads?

A. Not in sufficient detail to cover each particular class.

Q. Do you know how long it takes, ordinarily, to unload a car of coal?

A. That varies very much—runs from 24 hours to two weeks.

Q. Supposing a certain number of men—the average number of men—are in the car, unloading a sixty thousand pound car with shovels, how long will that take?

A. I cannot tell you?

Q. You do not know? A. No sir.

Q. Do you know anything from personal experience with reference to the general make-up of your switching yard, and the distances to and from the various industries located upon your tracks in Omaha?

207 A. Only in a general way.

Q. Only in a general way? A. Yes sir.

Q. Do your tracks run north of Douglas Street?

A. Yes sir.

Q. How far north do they run?

A. I cannot tell just how far north.

Q. You don't know whether it is two or three blocks, or a mile?

A. I am not acquainted with the physical characteristics, except in a general way.

Q. Now, will you name to the jury some of the commodities which it takes only a very short time to unload?

A. Well, fruit, for instance.

Q. How long does it take to unload a car of fruit, ordinarily?

A. That depends on the consignee. He can take any time he wants to unload it; but do you mean the necessary time to unload it?

Q. Yes.

A. Well, I should say an hour or two. That is an estimate—I cannot say that I ever watched them, personally.

Q. How long would it take to unload a car of baled hay?

A. I don't know as I would undertake to say.

Q. Will you state a few of the commodities that it takes the longest time to unload, when they have a sufficient number of men, or as many men as can work conveniently?

A. I would say coal and lumber and sand, and things like that.

Q. Do you know how long it takes to unload a sixty thousand pound car of sand with the usual number of men?

A. As I stated, I have no knowledge of that.

208 Q. Then there are commodities where four days to take a car from the Union Pacific and deliver it to the consignee, and have it unloaded and deliver it back would be a reasonable time? A. Yes sir.

Q. There are commodities, however, where two days, or perhaps one day, would be a reasonable time, depending upon the distance of hauling and the time of unloading, in which to take a car, deliver it to the consignee, have it unloaded, and return it, are there not?

A. Yes sir, there are certain commodities you might do that with.

Q. And for which 24 hours or 48 hours would be ample time?

A. Yes sir, depending, as you say, on the distance.

Q. And upon the time it takes to unload the car?

A. Yes sir.

Q. So the four days time, as provided for in Rule 2, has no application to the delivery of grain from the Union Pacific bridge to Gibson, one mile or a mile and a half below, the car to be unloaded in from thirty minutes to ten hours and returned to that track—Rule 2 has no application to that, except including that in the general average of four days?

A. It does not specifically refer to grain.

Q. I believe you said that, personally, you had had no experience down on the tracks with the movements of cars?

A. None whatever.

Q. And no knowledge of the congestion in certain switching district? A. None whatever.

Q. You rely upon your records solely?

209 A. Records and our yardmen and records.

Q. You had nothing to do with making up Plaintiffs' Exhibit 6? A. I did not.

Q. And when you state that that is a consensus—you gather that from other sources, you assume that to be true?

A. Those are instructions issued by the proper official.

Q. Have you had any personal experience in the unloading of cars of all kinds of merchandise? A. No sir.

Q. Some of those cars go—do they not—to an elevator where they can be unloaded in a few minutes?

A. Yes sir.

Q. And some go to the warehouses where many men begin at once to unload? A. Yes sir.

Q. Some of them go to the wholesale houses where they are unloaded rapidly? A. Yes sir.

Q. Some of them go to what are called "team tracks" away from the busniess portion of the city where what they are loaded with is hauled away by the wagon load?

A. Yes sir, that is true.

Q. Sand and coal and such things is loaded with a shovel into the wagon by hand and hauled away sometimes?

A. That is true.

Q. From your own knowledge, you don't know whether four days is a reasonable average time or not then?

A. If you refer to my own knowledge of the actual time it takes to unload, I would say—the knowledge I have that the rules are based on the average time—I would say yes.

Witness excused.

210 George W. Dodrill is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed. P. Smith he testified as follows:

Q. What is your name? A. George W. Dodrill.

Q. What is your business? A. Switchman.

Q. Where are you employed?

A. Burlington Railroad.

Q. How long have you been with the Burlington?

A. Oh, somewhere close to nineteen years.

Q. How long have you been engaged in the switching service?

A. Ever since I have been in the employ of the company.

Q. Where are you employed?

A. I have been employed all over the Burlington yard in Omaha.

Q. Your employment is largely here in the Burlington yards? A. Altogether.

Q. Switching cars from one track to another?

A. Yes sir.

Q. Have you had actual experience in the switching of cars to the Nebraska-Iowa Grain Company's elevator?

A. I have done it.

Q. You know where their elevator is located?

A. Yes sir.

Q. Do you know where the transfer track is on which the Union Pacific places cars that are to be switched by the Burlington to the Nebraska-Iowa elevator?

A. Yes sir.

211 Q. Have you taken cars from that track and switched them to the Nebraska-Iowa elevator?

A. Yes sir.

Q. During what period of time have you done that?

A. Done it ever since the Nebraska-Iowa elevator was located on the Burlington tracks.

Q. And these tracks where cars are placed intended for the Nebraska-Iowa elevator—are cars also placed there intended for other industries on the Burlington tracks?

A. Yes sir.

Q. What other industries have cars placed on that transfer track?

A. Do you want me to name over what industries?

Q. Just in a general way. All of them here in town?

A. Yes sir, I could name probably a hundred different industries.

Q. Any industry located on the Burlington track having cars come in over the Union Pacific, the cars are placed on that track? A. Yes sir.

Q. And from there they are picked up by your crew and placed to the different industries? A. Yes sir.

Q. Does the volume of traffic vary from day to day—the number of cars to be switched to the various industries?

A. Yes sir.

Q. Sometimes have a congested yard?

A. Sometimes have lots of business, and at other times it is slack.

Q. Does the length of time it requires to take those cars and send them to the various industries depend at all upon the volume of traffic in the yards?

212 A. To some extent it does, yes sir.

Q. If you have a congested yard it takes more time?

A. Yes sir, takes a longer time.

Q. Now, can you tell the jury about what is the reasonable and average time required to take a car of grain from the transfer track on which it has been placed by the Union Pacific, switch it to the elevator of the Nebraska-Iowa Grain Company, permit it to remain there from one to ten hours in order to be unloaded, then in the usual and ordinary course of business pick it up by a switching crew and return it to the transfer track of the Union Pacific, having in mind the difference in the volume of business from day to day—do you know what is the reasonable time to do that under all those circumstances? A. Yes sir.

Q. You give that from your actual experience?

A. Well, I think I do.

Q. Do you know about what is the usual and ordinary time required to perform that service? A. Yes sir.

Q. I mean, about? A. Yes sir.

Q. What is it?

A. Well, in my opinion, about three days in all kinds of circumstances.

Q. Under some circumstances you could do it in less time? A. Yes sir.

Q. Under some circumstances it would take more?

213 A. Under some circumstances it would probably take more.

Q. What would cause the difference?

A. An increase in business.

Q. Would the condition of the weather have anything to do with it?

A. Yes sir, the weather has a great deal to do with switching at times.

Q. Does the question of the location of the different industries to which the various cars are to be set have something to do with the speed with which you can distribute them?

A. Yes sir, some places are unhandy to get to—unhandy to do the work in—others is convenient.

Q. Have to go further in some instances? A. Yes sir.

Q. Are there other industries located on the tracks down at Gibson? A. Yes sir.

Q. In that vicinity? A. Yes sir.

Q. In what part of town are the Gibson yards?

A. The south part.

Q. Down near the river? A. Yes sir.

Q. Some of those industries to which you have to switch cars are located in other parts of the City of Omaha?

A. Yes sir.

Q. It takes in the wholesale houses, does it? A. Yes sir.

Q. Grocery houses and the agricultural implement houses.

A. Takes in all those places down in that part of town—the business part of town—wholesale.

214 Q. Just give us some of the principal ones of the different industries to which you switch those different cars?

A. Well, I start in about Capitol Avenue, Eighth and Capitol Avenue—Sunderland Brothers have a yard down there—

Q. It takes too long to endeavor to enumerate all of them; tell the jury about how many of them there are?

A. Well, there are at least a hundred, without counting, anyway.

Q. A hundred different industries reached by the Burlington switching crew?

A. I think there are very near that many.

Q. Located in different parts of the city?

A. Located from Cass Street to South Omaha and to Gibson.

Q. And cars coming in off the Union Pacific, no matter for what one of those industries, would be placed on this transfer track? A. Yes sir.

Q. Then you take them from there and distribute them?

A. Yes sir.

Cross Examination

By Mr. Rich:

Q. How many switching crews has the Burlington in this switching district in Omaha that attend to this business.

A. They are working five engines days and four nights at the present time.

Q. What was the condition in 1906 and 1907?

A. I believe business was pretty heavy at that time. I don't just recall—I think we was working about fourteen or fifteen engines.

215 Q. When you say engines you mean crews?

A. Yes sir.

Q. That is, you were using, in 1906 and 1907, about fourteen crews to take care of this switching business in Omaha?

A. I wouldn't say positively, but I think that is about it, as near as I can remember.

Q. You think that is about it? A. Yes sir.

Q. Now did any switching crew have any particular district turned over to it to take care of? A. Yes sir.

Q. Did any particular crew or crews take care of the business from the Union Pacific-Burlington transfer track down to Gibson and back? A. Not any one particular engine.

Q. Not any one particular engine? A. No sir.

Q. Well, suppose you did have fourteen at work at that time, did all fourteen run down to Gibson?

A. No, they did not all.

Q. How was that divided at that time—how many switching crews do you think you had operating between this transfer track and Gibson?

A. Well, there probably was two of those crews that operated between those two points.

Q. Now would those crews go any place else up in Omaha except just to this transfer track where the Union Pacific leaves the cars, or to the other transfer track by the side of it where you leave cars for the Union Pacific?

216 A. Yes sir.

Q. Where else would those switching crews go?

A. They would go to the north transfer, that is the OBT, the Missouri Pacific, the M & O and different places.

Q. Then those two switching crews that you had at that time would go to various other transfer tracks, but the only business they had would be business destined for Gibson?

A. No sir, they had business destined for any place.

Q. You told me there were two crews that did business between Gibson and this switching track?

A. Yes sir, and they did other business with that, too.

Q. They do other business with that? A. Yes sir.

Q. Did any of the other crews go down to Gibson?

A. Well, there might have been other crews backwards and forwards.

Q. Then it was not confined to two crews out of the fourteen?

A. No sir, there is nothing confined to any crews individually. We work a switch engine any place there is work for it to do.

Q. How does the crew get orders what do to?

A. Get it over the telephone, from messenger boys and the yardmaster.

Q. Does any crew watch this Union Pacific transfer track?

A. There is a certain time of day to pull it.

Q. Do you remember, in 1906 and 1907, how many times a day you pulled that track? A. No sir.

Q. How many times do you pull it now?

A. We aim to pull it twice a day regular.

217 Q. What do you mean by a day—twenty-four hours?

A. Yes sir.

Q. You try to get down there twice a day and take off all the cars the Union Pacific leaves on there? A. Yes sir.

Q. Suppose you go down to that Union Pacific transfer track and find twenty cars there—now tell the jury how you handle that twenty cars?

A. Take that twenty cars—if they are for twenty different places they are distributed to those twenty different places.

Q. Do you try to arrange the cars, in their location in the train, with reference to the location of the different places to which hey are to be distributed?

A. Cars going to Gibson or South Omaha are taken down that way that night, distributed up to the districts next day—cars going to the north part of town put onto one of our tracks down on the bottom and pulled off there and distributed to the industries during the night or the next day.

Q. If one crew went down to this Union Pacific track and found twenty cars there, then it would begin to distribute them first with reference to where they were going, and some of them they would set on the track going to Gibson?

A. Yes sir.

Q. Some of them they would set on the track going to South Omaha? A. Yes sir.

Q. Some of them they would set on the track going to the north part of the city or going to other railroads. What crews would pick up those cars—the same crew wouldn't take

218 the cars to Gibson and South Omaha as would take the cars to the north part of town, would it?

A. No sir, it is just owing to what crew came along that we wanted to use on that work.

Q. Whatever crew wasn't busy, and came along, would be used on that work? A. Yes sir.

Q. Can you give any idea of the number of cars the Union Pacific delivered to you on that track daily in 1906 and 1907?

A. Well, along in 1907 we received about eighteen or nineteen hundred cars per month.

Q. Eighteen or nineteen hundred cars per month?

A. Yes sir.

Q. That would be sixty or seventy cars a day?

A. Sixty to seventy cars a day.

Q. You think that condition existed in 1906 as well?

A. Well, I wouldn't say positively because it is quite a while back.

Q. Now what else is there at Gibson besides this elevator company?

A. Well, we have a rapair track, we have a round house and a brick yard, and we have what we call a team track.

Q. That team track is where you set the cars to be unloaded into wagons? A. Yes sir, or a car set to be loaded.

Q. You don't take many cars down to the team track at Gibson to be loaded?

A. No very many, still we have quite a few. We have a lumber yard down there and they unload lumber—they saw lumber and have saw dust, and have an iron yard down there—load iron.

Q. In 1906 and 1907 how many cars would you take a day to Gibson for everybody?

219 A. Cars—you mean all told?

Q. Yes? A. Oh, probably four or five hundred.

Q. Well, those cars were not for delivery at Gibson to any industry? A. No sir.

Q. You have freight yards where you make up trains there?

A. Yes sir.

Q. You would take those cars from the Union Pacific track to be made up into freight trains?

A. Why some cars is taken from there to make up into trains.

Q. Suppose the Union Pacific brought a loaded car in from the west, destined for Chicago by way of the Burlington, you got this car off the transfer track— A. Yes sir.

Q. Where would you take that car to make it up into a train for Chicago?

A. It is owing to what kind of freight it was.

Q. Would you make up any at Gibson? A. Yes sir.

Q. What kind of freight? A. Dead freight.

Q. In case it was stock what would you do with it?

A. We would haul it up at what we call our freight house yard, and put it on a time freight train.

Q. Where does the Union Pacific deliver stock to you, destined Chicago? A. They have only one transfer.

220 Q. They don't deliver any live stock to you on that transfer?

A. Yes sir, we have received live stock on that transfer.

Q. Do you do that now?

A. When they have any to deliver to us we receive it.

Q. Isn't it a fact that that is delivered in Council Bluffs?

A. No sir,—they may deliver it in Council Bluffs.

Q. And you say you have known live stock to be delivered to you down on this transfer track?

A. We deliver livestock every day, and receive it whenever it comes our way down there.

Q. You receive it from the Union Pacific, do you, down on that transfer?

A. Yes sir, whenever they have any to deliver to us.

Q. How often does that occur?

A. Not very often at the present time.

Q. How often in 1906 and 1907?

A. We got quite a bit of stock for this distillery in 1907, I think it was.

Q. Well, certainly, anything delivered to you for your switching district would be put on that track, but that is stock they were going to feed at the distillery? A. Yes sir.

Q. Did you receive on that track any livestock destined for Chicago—on that exchange track?

A. Well, I wouldn't say as to that positively. We received stock—emigrant stock—anything like that.

Q. What I have in mind particularly is sheep, horses, cattle, hogs destined for Chicago? A. I don't remember any of that.

Q. Did you receive any for Chicago in 1907 and 1906?

221 A. I wouldn't say definitely whether we received any for Chicago.

Q. How many times a day do you go down to Gibson—any of your crews?

A. Well, we have an engine that starts out at seven o'clock in the morning, and goes down there, and we have an engine that goes down at noon, and have an engine that goes down at night.

Q. Any engines that go down in the night? A. Yes sir.

Q. How many trips do all of your crews make between that transfer track and Gibson in a day?

A. I couldn't say.

Q. Can you give me an idea?

A. They might make one apiece during the day, and might make a dozen—just owing to how business is.

Q. Well, your fourteen crews might go down to Gibson once a day each? A. Oh, no, not fourteen of them.

Q. How many of them?

A. Well, I said two of them in the beginning—there is two that takes more business up and down there than the balance.

Q. Those two may go down a dozen times?

A. Just as often as we see it is necessary for them to go down to attend to the business.

Q. If there are five or six cars standing on the switch track for Gibson how long does it take you to hitch onto them and take them down to Gibson?

A. Why, just long enough to couple onto them, say five minutes, or two minutes to couple on, provided they are inspected and ready to go.

222 Q. How long to haul them to Gibson?

A. I have seen times that it took five minutes and I have been seen times that it took ten hours.

Q. Why?

A. On account of the congestion of the yard, and snow and storms or something of that sort.

Q. What is the usual time, from the time you hitch onto a train, to take it down to Gibson?

A. They use about thirty minutes if everything is clear. We have the block system to stop for—it is a single track all the way.

Q. But it is not a part of your main running track?

A. No sir, it is not the main line.

Q. You have just that single track to Gibson?

A. Yes sir.

Q. When you haul those cars down to Gibson, if in the train you haul down there you would have some cars for the elevator, how long, ordinarily, would it take you to set those cars out to the elevator?

A. Well, if we took a train down there at noon, it is usually not broken up until that evening or that night.

Q. Then when you break it up you set the cars in?

A. Yes sir.

Q. Then in pulling cars out of Gibson destined for the Union Pacific transfer track, returning cars for the Union Pacific, how often do you pull those cars back from Gibson—how many trips a day? About the same number as you make going down?

A. Yes, about the same number.

Q. When you go down there with cars and there are any cars to bring back you usually bring them back, do you not?

A. If they are ready to come.

223 Q. So you may make four or five trips a day down there, or may make twenty-five down there and back hauling cars both ways?

A. Oh, we wouldn't make that many trips.

Q. Well, how many would you make?

A. We might make a half a dozen trips.

Q. You said that each crew might go down a dozen times a day?

A. There is two crews that I said goes up and down there, when business requires it, just as often as we can get them along there.

Q. What do you mean "when business requires it"? How many cars do you hitch onto an engine and pull down to Gibson? A. It is owing to the kind of weather it is.

Q. Suppose you find three cars on the Union Pacific track for Gibson, and your engine is going to Gibson?

A. If we had them off of the transfer, and the engine was going to Gibson, we most likely would pull them down.

Q. If cars are down there destined for the Union Pacific, and you have an engine coming back, you pull them back and put them on that track?

A. It is owing to how the yards are.

Q. When the yard is congested you cannot move cars so rapidly? A. No sir.

Q. When you stated it would take about three days, what did you base that on?

A. That we pull the transfer this afternoon, that is taken to Gibson during the night. They are placed on the elevator track tonight, and tomorrow morning they are emptied—tomorrow afternoon or tomorrow night—and brought back the next day.

224 Q. That wouldn't be three days, would it—that would be 48 hours, two days. Now do you have in mind the history of any particular cars when you state three days?

A. That would be about the average of all cars, three to four days.

Q. You think that would be the average of all the car.?

A. Certainly. If a man picks up one car—a man couldn't take one car down there and wait until it is emptied and bring it back the same day.

Q. Does the Burlington attempt to aid its customers by moving cars as speedily as possibly when they are unloaded?

A. Yes sir.

Q. If you delivered a car to a customer down at Gibson and it took him an hour to unload it, and if you delivered a car to another man that took 24 to 48 hours to unload, you wouldn't wait to bring the ten minute car back until the 48 hour car was unloaded, would you?

A. We bring them back as quick as we can get to them.

Q. When you say three days you have in mind a car that takes ten minutes to unload, and one that takes three or four

days to unload, and you say the average time would be about three or four days? A. Yes sir—

Q. Cars that it takes a long time and a short time to unload you are trying to average up, and you are giving the average of the whole thing?

A. Well, in switching, you know, you can't go and pull a track as soon as the car is empty—you have a line of business to follow, and have to keep your cars moving as they should.

Q. Do you kow how many loaded cars the tracks lead-
225 ing to the elevator down at Gibson will hold?

A. Yes sir.

Q. How many?

A. About eighteen cars; that is to lead into the elevator—they will hold about forty or forty-five cars all told, the length of them.

Q. Suppose you have eighteen cars for the elevator down there, and you take them down there and set them, and they are emptied the next day in six or eight or ten hours, when do you take those out of there?

A. Probably that evening or that night.

Q. You would not let them stay there all that night and the next day, would you?

A. In some cases we have to do it.

Q. That is, if the congestion in the yards was so great that you could not move them, they would stay there?

A. Some of them—we keep all our business equal—try to keep all the business equally divided.

Q. If you took those cars to-day at noon and set them on the track tonight, and they were unloaded tomorrow, if they are standing there empty you would pull them out of there tomorrow night, wouldn't you?

A. Most likely would.

Q. Now, how long would you think they stay down at Gibson?

A. Couldn't say just as to the time—probably come down that night or the next morning.

Q. And come back to Omaha? A. Probably.

226 Q. Well, so far as cars are concerned that go down to this Nebraska-Iowa elevator at Gibson and are unloaded and returned to the Union Pacific tracks, ordinarily those cars would be taken from the Union Pacific tracks, and taken down to the Gibson, unloaded and returned to the Union Pacific track, in from 24 to 36 hours, wouldn't they—that class of cars?

A. No, I can't figure it 36 or 24 hours. I say cars would be delivered from the Union Pacific this morning, be inspected so we can pull them this afternoon, pull them down, switch them in our lower yard, down to Gibson sometime tonight, or

in the morning and placed on the elevator track, probably unloaded tomorrow, tomorrow night they would be taken out and probably not be delivered until the next morning.

Q. That would be from twenty-four to thirty-six hours?

A. It would be consuming what we count—what we would call three days, today, tomorrow and the next day. We would receive the cars today, they would be unloaded today and back the next day.

Q. You would receive the cars this afternoon, down on the Union Pacfic track, to take to Gibson, inspected and ready to pull. You pull them down to Gibson this afternoon, set them at the elevator tonight or tomorrow morning, they are unloaded tomorrow and they are taken out from the elevator tomorrow night and returned to Omaha the next morning, and as that work has been done in the light of three separate days you call that about three days? A. Yes sir.

Q. And that is what you mean by three days.

A. Yes sir. I think that would be about three days.

227 Q. Now would you be surprised if you learned from the sworn testimony of the elevator people themselves that the great majority of those cars were taken from Omaha down to Gibson, set on the tracks, unloaded, put back in your yard, and brought back to the Union Pacific in forty-eight hours?

Mr. Smith: We object as being wholly immaterial whether this witness would be surprised by someone else's testimony or not.

Objection sustained. Defendant excepts.

Q. Did you ever keep any record, or have you any way of getting hold of any record of grain cars taken from the Union Pacific Burlington transfer down to Gibson, unloaded, brought back and put on the Union Pacific transfer?

A. Yes sir.

Q. You have a record of that, have you?

A. Yes sir.

Q. Where is it? A. Down in the office.

Q. Can you get that record?

A. I possibly could by going and looking it up.

Q. Have you the record of 1906 and 1907 of that same work?

A. I don't know of 1906, I didn't have charge of the yard in 1906.

Q. You worked in the yard in 1906? A. Yes sir.

Q. Who keeps that record of the movement of cars from the Union Pacific transfer down to Gibson and back?

A. The yardmaster.

Q. What is his name?

A. W. P. Mettling. I don't think he would know anything about it, though, to save you the trouble. I handled the yard at that time.

228

Q. Now, let me ask you what kind of a record do you keep when you move a car down to Gibson?

A. The time you receive it at the transfer; the time arriving at Gibson; time set at elevator; time taken out from elevator; time set back on transfer.

Q. What do you have in the way of a book?

A. A regular form—initial, number, from, to, time received, and all this.

Q. Now the first item on that is time you get it from the Union Pacific tracks? A. Yes sir.

Q. Well, that time isn't the time, then, that the car was set on your track, but the time you took it off the transfer track? A. Yes sir.

Q. Now give me the other time?

A. Then the time you set it in on the elevator track.

The Court: Does the time commence at the time you set on the Union Pacific tracks, or the time you take it from the U. P. tracks?

The Witness: We enter in our book the time we pull them from the transfer.

Q. The time you put them on the Gibson elevator track?

A. Yes, sir.

Q. Then do you enter the time when you take it from your yards at Gibson, or do you bring it right on on that time?

A. It is just according to how we are fixed; whether the same engine that takes it out of the elevator brings it or waits for some other engine.

229

Q. If your engine merely puts it into your yards to bring to Omaha, and some other engine brings it to Omaha, then you have a record of the time that engine starts from Gibson with it? A. Yes sir.

Q. And then you have a record of the time that engine crew puts it on the U. P. transfer track? A. Yes sir.

Q. Are those records on loose sheets?

A. No sir, they are in book form.

Q. Who notes the records—what member of each crew?

A. The foreman.

Q. Then those records are turned over to the yardmaster?

A. Yes, sir.

Q. And should be in the possession of the yardmaster properly? A. Yes sir.

Q. Have you ever paid any particular attention to the time it takes you to take a car of grain from the Union Pacific transfer track down to Gibson, have it unloaded and bring it back to that track? A. I have in some cases.

Q. In some particular case? A. Yes sir.

Q. Why were you doing it in those cases?

A. On the request from grain men to do so.

Q. What grain men?

A. From the officials of the Nebraska-Iowa elevator, I believe.

Q. How often did you keep such a record?

230 A. Well, I dont know. I kept a record of a couple of hundred or so cars, something along in there. I don't remember just exactly.

Q. When? A. I think along in 1907.

Q. What did you do with the record?

A. I have got it.

Q. Did you ever deliver it to the grain men?

A. No sir.

Q. What period of time was that in—what month?

A. Well, I can't recall the month.

Q. Was it a time when there was much congestion or much work on the Burlington switching tracks?

A. Yes, we had a good deal of work, but the grain business was real heavy, and we did everything we could to accommodate the elevator people and get their grain through.

Q. That is, you moved it in and out as rapidly as you could?

A. Yes sir, as rapidly as we possibly could—made several trips.

Q. Where you would make a special trip with a car then it would only take you the thirty minutes going down, or the thirty minutes coming back, added to the time it would take to unload the car?

A. I have taken grain down there, I think in thirty minutes on a special trip.

Q. What is the shortest time in which you have taken grain down there, had it unloaded, and brought that car back to the Union Pacific track?

A. I couldn't say. The shortest time though, I think, was

(?)

in the neighborhood of forty-eight hours, something

231 like that. I wouldn't be positive of it—it has been quite a while.

(?)

Q. You say you think forty-eight hours is the shortest time?

(?)

A. I think so, forty-eight hours we have taken grain down there and unloaded and brought it back by making a special run both ways.

Q. Have you that record with you? A. No sir.

Q. Where is it?

A. Down in the office, I think.

Q. Did you file it with the yardmaster?

A. I have it put away down there some place.

Q. Will you bring that up with you—will you make a search for it? A. Why, yes, I can I guess.

Q. I wish you would make a search for it and bring it here. You have said to the jury, have you, the ordinary movement, now, in getting grain from the Union Pacific switch track down to the Nebraska-Iowa elevator company, and getting the cars back to the Union Pacific track; for instance if you find the cars down on the switch track about noon, you take those cars about noon, or a little after noon, to Gibson?

A. We don't take them down—we don't pull the transfer until afternoon. Then we switch those out in the lower yard and they are taken down at night sometime.

Q. Well, taken down that night—you switch that yard in the afternoon, and they are taken down to Gibson at night, and they are set to the elevator either that night or early the next morning—is that right—set there in the morning?

A. Either that night or in the morning.

232 Q. Now, if there are eighteen cars on their unloading track, then you couldn't set any more cars on the track, could you? A. No sir.

Q. That would be full? A. Yes sir.

Q. When you took cars there in the night-time or in the morning to put on that unloading track, what is your average experience or what was it in 1906 and 1907, did you usually find that track clear by morning?

A. Why, yes, they generally cleaned in the afternoon.

Q. So when you got there in the night or in the morning with whatever cars you had you could put them right on the unloading track?

A. Yes sir, at times we could. Of course there would be times we couldn't.

Q. What would be the average number of cars you would put on that track per day, do you think?

A. Well, I don't know. Sometimes we set in cars there four or five times a day.

Q. And as fast as they would unload those cars then they would push them past the elevator?

A. They would go down by the elevator.

Q. And they usually could unload that full track in a day? A. Yes sir.

Q. Then the cars you put there in the morning would ordinarily by night be unloaded and pushed past the elevator on the tracks? A. Yes sir, in most cases.

233 Q. That would be a little over twenty four hours from the time you took them off the Union Pacific transfer. Now that night you would pull them out of the elevator track—off of the elevator track—ordinarily, would you? A. Yes sir.

Q. And bring them back to Omaha?

A. If they did not come up during the night they would the next morning.

Q. They would the next morning? A. Yes sir.

Q. And if they got here the next morning by eight o'clock that would be several hours less than forty-eight hours, wouldn't it?

A. Well, it would be less than forty-eight hours?

Q. Several hours less than forty-eight hours?

A. Yes sir.

Q. Now, then, that motion, that movement you have just told about, was that the average ordinary movement of a grain car from the Union Pacific track in Omaha to Gibson and back to the Union Pacific track?

A. Well, not in all cases.

Q, No, I don't mean that; I know there were cases when it took several days, but was that the average movement and the time in which the average movement was made?

A. That is the way we figured the work, just as I explained—took them down one day, unloaded them the next, and bring them back the next.

Q. Then you would tell the jury, would you, that in ordinary times forty eight hours would be sufficient time, and ample time to take a grain car from the Union

234 Pacific transfer track, Union Pacific-Burlington transfer track, take it to Gibson, have it unloaded, put it back—have it unloaded and bring it back, and put it on the Union Pacific transfer track; that would be sufficient time for that grain to make that movement in ordinary times?

A. I wouldn't say that—if we had nothing else to unload but the grain it might be.

Q. Now you have told the jury that that was the ordinary way in which you did it?

A. Yes sir, I figured on the three days.

Q. You are getting it back to Omaha early in the morning of the third day?

A. Well, we got it back that day sometime.

Q. Well, that wouldn't be forty-eight hours, would it?

A. Yes, I would call it forty eight hours.

Q. It would be twenty-four hours from noon time, or the afternoon when you started to pull it to Gibson, to the afternoon of the second day—that would be twenty-four hours. Then it would be twenty four hours after dinner of the day on which you got the car back onto the Union Pacific track. Twice twenty four is forty eight, so naturally the movement you have described to the jury wouldn't take you forty eight hours; it wouldn't take you forty eight hours to take those cars down, have them unloaded and return them, would it?

A. Well, I don't know as to that.

A. Well, when you say three days, you want the jury to understand that it is the three days just as you have described it, don't you?

235 A. I certainly do.

Q. That, is to take the cars from the Union Pacific transfer track after dinner today, get them down to Gibson tonight or tomorrow morning, and by tomorrow morning have them set on the elevator track—on the elevator unloading track—have them unloaded tomorrow, picked up tomorrow night and brought back to Omaha tomorrow night or the day after in the morning; now does that describe the ordinary movements in the handling of grain taken from the Union Pacific-Burlington transfer track destined for the Nebraska-Iowa elevator at Gibson?

A. Well, that would be pretty close to it.

Q. Well, now, I tell you, Dodrill, you are here to give testimony in this case so that this jury can decide this lawsuit, and you ought to give it the best you can.

Mr. Smith: Well, I think he is helping us a good deal.

Mr. Rich: All right.

Q. Now, Dodrill, you see the importance of your testimony to this jury, and I want you to fix the time definitely, if you can. Now, have I told the movement correctly?

A. Well, pretty near it.

Q. Well, now, if I have not I want you to tell the jury wherein I have failed to state those movements correctly?

A. Well, where we say morning here, it might be possibly very near noon. When we get the cars back we may get them back a little earlier and it might be a little later.

Q. With that exception have I stated it correctly?

A. I guess that is about it.

Q. You think I have? A. Yes, I think so.

236 Q. When you said three days, then, you had in mind that part of this afternoon, tomorrow, and that portion

of day-after-tomorrow morning that it took you to bring the car back to Omaha?

A. We use part of three days, as you say, and two full nights in the operation.

Q. And you call that three days? A. Yes.

Q. Have you seen that report, or that record that you kept for the elevator people, lately?

A. No sir, I haven't.

Q. You have not looked it up for some time?

A. No, I haven't seen it since it was filed in 1907?

Q. Did you give the elevator people a copy of it?

A. No sir.

Q. Did you report to the elevator people the contents of it?

A. No sir.

Q. Well, then, it was just a regular report you had to make to the company?

A. Certainly. I didn't have to make any report to any individual.

Q. I thought you said the elevator people asked you to make reports?

A. No, they asked me to hustle it up and make special trips.

Q. You did that for them?

A. Yes sir, I did; not only for the elevator people but for anybody located on the Burlington when I could.

237 Re-direct Examination

By Mr. Smith:

Q. Mr. Dodrill, if cars were brought in by the Union Pacific and placed on this transfer track, what did you say about inspection?

A. The car has to be inspected before you can couple onto it with an engine—the whole string—no matter if there is one or fifty, they must all be inspected before you can couple on to them.

Q. What do you mean by inspection?

A. A man goes around and pounds every oil box, and looks at every truss rod and brake staff, and looks at the roof and the running boards, and sees that the car is in perfect condition before it is received.

Q. If the Union Pacific was to set in thirty cars on the transfer track, say at this hour today, Thursday, when would those be inspected?

A. Well, it is 3:40—they would be inspected about six or seven o'clock probably.

Q. And they could not be moved until after that?

A. No sir.

Q. Now, let us assume that in these thirty cars set on the transfer track at this time on Thursday, there are thirty cars, five of which are intended for the Nebraska-Iowa Elevator Company, and the balance for other industries here in town; those would be inspected, you say at six o'clock tonight?

A. The car inspector is allowed three minutes for each car, if it comes right down to figures.

238 Q. Does he wait there all the time?

A. Yes sir, he is stationed there from seven in the morning until seven at night, and then a man relieves him at seven at night and stays until seven in the morning.

Q. After he gets through with his inspection at six o'clock tonight, what is the next thing done with those cars?

A. There is an engine comes and pulls them probably.

Q. Pulls the entire thirty? A. Yes sir.

Q. And then what does he do?

A. Takes them down to the lower yard and slides them up for different parts of the yard.

Q. They are taken to the lower yards and there broken up for different parts of the city? A. Yes sir.

Q. If they are intended for fifteen different industries you don't have fifteen different engines to pull them, do you?

A. No sir.

Q. Some cars have to wait, then, until others are distributed? A. Certainly they have to.

Q. If in that train there are cars intended for 12 or 15 different industries, how long would it reasonably take before all of them would reach their destination?

A. Well, it takes quite a while, sometimes, to get around to all those places. Some of your cars probably wouldn't be delivered for two or three days to their destination.

Q. Why not?

A. Well, it takes time to get around to all those places.

239 Q. If all of them were intended for this elevator at Gibson they could be gotten down there in a short time?

A. Yes sir.

Q. But if intended for different points around the city some have to wait until others are distributed?

A. Yes sir.

Q. Then if they were intended for fifteen different industries, and the cars that went to the grain elevator at Gibson were some of the last in the train, they wouldn't reach Gibson until probably what time?

A. Well, probably two days afterwards.

Q. So whether or not you can take them down and have them to Gibson by tomorrow morning depends upon whether or not cars are intended for different industries in different localities? A. Yes sir.

Q. What, as a matter of practical experience, is the fact—are they intended for different industries?

A. Oh, my yes. We receive them for all places.

Q. And as a matter of practical every-day work do you find that you are able to deliver all those cars to those different industries by the next morning? A. No sir; no sir.

Q. If that man inspected them at six o'clock tonight, and they were pulled some time during the night to the lower yard, as a matter of practical experience, how long would you say it would take to deliver those cars to the several industries, if intended for ten or a dozen different industries?

A. I would say we would have them put away by Saturday anyway. (This being Thursday)

240 Q. If a car was intended for the Nebraska-Iowa Grain Company, as a matter of practical experience you might not get it there until Saturday morning?

A. Might not if it was last.

Q. Do you give any kind of dead freight any preference?

A. No sir, aim to give everybody the same service.

Q. Well, then, are there frequently that many cars placed on this track by the Union Pacific?

A. When business is pretty good we receive about 70 to 80 cars, and sometimes more than that, in twenty-four hours.

Q. Do they come in in trainloads?

A. When they deliver them they deliver a transfer full as a general thing.

Q. How many is that?

A. Thirty-four cars.

Q. So there are liable to be thirty-four cars on there this afternoon?

A. Yes sir, and there might be fifteen for that many different places.

Q. And if intended for a great many some of them would not reach their destination until Saturday?

A. No sir, undoubtedly some of them wouldn't be left there until Saturday.

Q. Then when you go and pick up the empties, the locations in which the engines are attending to their business has something to do with the time those cars can be picked up?

A. Yes sir, it certainly does.

241 Q. Those crews attend to the cars placed on their transfer track in Omaha? A. Yes sir.

Q. How many transfer tracks have you?

A. We have four different transfer tracks connecting with the Union Pacific, the M & O, the Rock Island and O B & T.

Q. How do you get cars from the Milwaukee?

A. Through the Union Pacific—all Milwaukee cars through the Union Pacific.

Q. The crews that you refer to attend to all those transfer tracks? A. Yes sir.

Q. And distribute the cars to all places? A. Yes sir.

Q. So you are not able to devote the attention of the crew just to those Union Pacific tracks? A. No sir.

Q. In your work down there as a switchman, tell the jury what you have observed as to the number of different industries you have to reach after a train of thirty-four cars is placed on this transfer track by the Union Pacific?

A. Well, we might possibly reach thirty-four, might not be any two cars for the same industry, and there might be two, or three or four for one industry.

Q. And if there were that many it would be at least forty-eight hours before the last one of that train would reach the industry for which it was intended.

A. Be lucky if he could have all those in forty-eight hours.

242 Re-cross Examination

By Mr. Rich:

Q. Do you mean by this last testimony to change what you said about the ordinary time of getting a car of grain down to Gibson and back?

A. No sir, I am not changing it.

Q. Not changing it at all?

A. No sir, not changing anything.

Q. This illustration of Mr. Smith's is an extreme one that you don't run across very often?

A. I don't know as to that.

Q. When you took thirty-four cars off of the transfer track, you told him they were broken up and put on other tracks?

A. Yes sir.

Q. If you have some for South Omaha they are put on one track and have some for Gibson they are put on another track, and have some for the north part of the city they are put on another. Now one engine doesn't begin to distribute all those, taking, for instance, South Omaha and distributing those, then coming back and distributing those to the north part of Omaha—distributing all the north Omaha bunch—and then taking the Gibson bunch and distributing those, does it?

A. Why, no. If they did they wouldn't get done all summer. We work the crews wherever we can use them to the best advantage.

Q. The various crews come and pick up these different cuts of cars and distribute them as rapidly as possible?

A. Yes sir.

Q. So you want to tell the jury that the method you explained awhile ago of taking a car from here down to
243 Gibson in the afternoon, having it set that night or the next morning on the elevator track, unloaded that day and brought back to Omaha that night or early the next morning, is the usual or ordinary method of handling those cars?

A. That is the way we aim to handle those cars—as soon as we can.

Q. And that time is sufficient to handle that grain, in the manner you described, under ordinary conditions?

A. Well, just as I explained it, we figure on the three days—today, tomorrow and the next day.

Q. Today, tomorrow and next day is ample time, is it, under ordinary circumstances, to handle that grain in the manner you have described and within the time you have described?

A. Yes sir, that is pretty close to it.

Q. That is about it?

A. (No response).

Q. How often would it occur that a car of grain on the Union Pacific-Burlington track destined for Gibson, and inspected by six o'clock, would fail to reach Gibson by tomorrow morning and be on the unloading track—how often would that happen?

A. Oh, I wouldn't think that would happen very often. If it didn't reach Gibson on the elevator track tonight it would in the morning in pretty good shape.

Q. In the ordinary business? A. Yes sir.

Witness excused.

At this time a five minute recess was taken, after which further proceedings were as follows:

244 Joel H. Wright, Jr., is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed. P. Smith he testified as follows:

Q. What is your business? A. Grain.

Q. You are connected with the Nebraska-Iowa Grain Company? A. Yes sir.

Q. In what capacity?

A. Treasurer and Assistant Manager.

Q. How long have you been connected with that company?

A. Since November, 1907.

Q. Were you in the Grain business before November, 1907?

A. Yes sir.

Q. With what company were you connected then?

A. With the Omaha Elevator Company.

Q. How long were you with the Omaha Elevator Company?
A. Probably ten years.
Q. During the years 1906 and 1907, up to November, you were with the Omaha? A. Yes sir.
Q. In what capacity? A. Chief clerk.
Q. And you were with the Omaha Elevator Company some ten years prior to that. A. Yes sir.
Q. Ten years prior to going with the Nebraska-Iowa?
245 A. Prior to November, 1907.
Q. In 1906 and 1907 did the Omaha Elevator Company operate a terminal elevator? A. Yes sir.
Q. Where is it located?
A. On the tracks of the Union Pacific at Council Bluffs.
Q. They have none on this side of the river? A. No sir.
Q. What was the capacity of that elevator during that time? A. A million and a half bushels.
Q. Did it, at that time, operate country stations?
A. Yes sir.
Q. About how many stations did it operate?
A. Seventy-two to seventy-five, I don't recollect the exact number.
Q. Were they all in the State of Nebraska? A. Yes sir.
Q. Along the line of what road?
A. All on the Union Pacific and its branches.
Q. Did the Omaha Elevator Company at that time purchase grain, other than what it bought at its stations?
A. Yes sir.
Q. Where did it make those purchases, and how?
A. In Nebraska, in the western part of Iowa and the northern part of Iowa.
Q. Where are the offices of the Omaha Elevator Company?
A. Bee Building.
Q. In the City of Omaha? A. Yes sir.
246 Q. Its elevators in Council Bluffs and its business office was here in the city, wasn't it? A. Yes sir.
Q. How did it make those purchases from country stations?

Mr. Rich: That is objected to as immaterial.

The Court: I think that should be sustained.

Plaintiffs except.

Q. Do you know whether or not it sent out card bids to country stations?

Mr. Rich: That is objected to as immaterial.

Mr. Smith: I am showing the similarity of the manner of doing business of the Omaha Elevator Company and these parties to this suit.

The Court: How they got the grain I think is immaterial. You can show how they got it in here and how it was handled here by the railroads; but how they purchased it, whether by telephone, or letter or card, or what arrangement they had I think is wholly immaterial.

Mr. Smith: All right.

Q. Grain that was purchased by the Omaha Elevator Company other than that bought at its elevator stations out throughout the state, was that brought to its elevator at Council Bluffs? A. Yes sir.

Q. Over the Union Pacific? A. Yes sir.

Q. Do you know personally what was done in the way of handling the grain that arrived over the Union Pacific at the elevator in Council Bluffs?

247 Mr. Rich: That is objected to as immaterial.

Objection overruled. Defendant excepts.

A. I don't just catch the question.

Q. Whether or not it was unloaded? A. Yes sir.

Q. Was it at that time? A. Yes sir.

Q. Was it weighed? A. Yes sir.

Q. Where? A. At the Peavey elevator.

Q. That is the elevator of the Omaha Elevator Company at Council Bluffs? A. Yes sir.

Q. By whom was it weighed?

A. The weighmaster of the Omaha Grain Exchange.

Q. Would its grain that was purchased by it in carload lots—that was bought Omaha terms—was that grain inspected?

A. Yes, sir.

Q. When?

Q. On the inspection track of the Union Pacific, or in the Union Pacific yards at Council Bluffs.

Q. By whom was it inspected?

A. The inspector employed by the Omaha Grain Exchange.

Q. If the Omaha Elevator Company purchased grain in carload lots on the floor of the Exchange but from other dealers here, where was that car placed for inspection?

Mr. Rich: That is objected to as immaterial.

Objection overruled. Defendant excepts.

248 A. If they purchased a car coming in off the Northwestern—

Q. No, I am talking about coming in off the Union Pacific?

A. I think it would be inspected on the inspection track at Omaha—the Union Pacific inspection track.

Q. At that time was the Omaha Elevator Company receiving grain in cars coming off the Union Pacific, other than the cars that were owned by the Union Pacific? A. Yes sir.

Q. What other kinds of cars were received by it loaded with grain? A. All kinds of cars.

Q. Well, did they receive grain in cars owned by other lines of road in Omaha, for instance the Burlington, Rock Island, Milwaukee and so on? A. Yes sir.

Q. Did it receive grain in cars belonging to eastern lines—New York Central, Pennsylvania, Baltimore & Ohio?

A. Yes sir.

Q. Were all those cars, no matter by whom owned, unloaded at their elevator in Council Bluffs? A. Yes sir.

Q. On what track or tracks was the elevator of the Omaha Elevator Company at that time?

A. Union Pacific tracks at Council Bluffs.

Q. Was their elevator reached by the tracks of any other road, Burlington or Rock Island?

A. Only through the exchange track—transfer track.

Q. But the tracks adjacent to the elevators are the Union Pacific tracks?

249 A. The Union Pacific tracks, yes sir.

Q. Do you know what was the mode of doing business there—as to what was done with cars when they had been unloaded and made empty?

A. They were run south of the house—they were run through the elevator on to the track south of the house, and remained there until the Union Pacific switch engine picked them up.

Q. And distributed them?

A. They distributed them, but we don't know what disposition they made of them.

Q. Do you know what was done by the Omaha Elevator Company during that period of time, in the matter of loading out and sending east cars of foreign roads that did not have a connection in Omaha, as, for instance, New York Central and Pennsylvania cars? A. Yes sir.

Q. What did they do in that regard?

Mr. Rich: That is objected to as immaterial.

Objection overruled. Defendant excepts.

A. Well, during the latter part of 1906 and 1907 we experienced a bad car shortage in this market, and as fast as foreign cars were made empty we would load them, ship them east or south over the line we desired or saw fit to.

Q. How many cars could you unload over there at one time ——how many unloading places did they have? A. Three.

Q. How many loading places?
A. About the same number.
Q. You could be unloading three cars and loading three at the same time?
250 A. Yes sir—well, let me correct that—we could unload six and load out three at the same time.
Q. What was done during this period time with foreign cars belonging to roads having their lines in Omaha and Council Bluffs, as for instance the Rock Island, what was done with them?

Mr. Rich: That is objected to as immaterial.

Objection overruled. Defendant excepts.

A. For instance if we received five Wabash loads at our house and we had a certain amount of grain going to St. Louis over the Wabash, those cars were loaded and pulled out over the Wabash. The same as that with the Burlington or Milwaukee, we would load them and send them to Minneapolis, Milwaukee or Chicago.
Q. If you didn't load them again, what was done with them, for instance, the Milwaukee?
A. Turned them over to the Union Pacific.
Q. Do you know what disposition they made of them?
A. No sir.
Q. If, however, they were cars belonging to eastern lines having no connection in Omaha, what did you do with them?
A. As stated before, if we could not get system cars to load over the Milwaukee east we used foreign line cars.
Q. What is the fact as to whether you communicated with those foreign lines, or had any permission or order from them for the use of the car? A. None at all.
Q. Now did you come to load those cars east?

Mr. Rich: That is objected to as immaterial.

Objection sustained. Plaintiffs except.

251 Q. Now, Mr. Wright, did the Omaha Elevator Company, at that time, purchase grain that came in off of other lines of road—the Burlington, and so [so] on?
A. Yes sir.
Q. What was done with those different cars of grain coming in over the Union Pacific, or coming in over different lines of road, in the matter of keeping it stored, or mixing it when it went into the elevator?
A. It was all run together.
Q. Did they have separate bins for each car?
A. No sir, that would be impossible.
Q. Was grain of different individuals mixed over there?

A. Yes sir.

Q. Now, in the purchase of wheat did they buy different grades of wheat at the same time? A. Yes sir.

Q. No. 2, No. 3, No. 4, or "No grade"? A. Yes sir.

Q. What was done by the Omaha Elevator Company after those different cars of wheat were purchased, with reference to mixing so as to get a uniform quality of wheat?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

The Court: Oh I think not, in view of what has been developed by you on cross-examination.

The defendant excepts.

A. Our Superintendent at the elevator had certain bins set aside for certain kinds of grain. For instance, he would
252 use a certain number for "4 hard", a certain number for "3 hard", and a certain number for "2 hard", and in selling our grain we get an average sample of the different grades and qualities, taking into consideration the color and one thing and another, and we submit those samples as being samples of so many hundreds of cars of wheat, that wheat in our house, and we sell on that sample.

Q. In order to fill that sale how would wheat be drawn from those different bins?

A. Certain percentages from certain bins.

Q. Was that done during the years 1906 and 1907?

A. Yes sir.

Q. Did the wheat which arrived over the Union Pacific and which was unloaded there at your elevator, did that enter into this mixture that made this sample that you are talking about? A. Yes sir.

Q. About what per cent or proportion of the grain that was handled there by the Omaha Elevator Company came in over the Union Pacific?

A. Well, the Omaha Elevator business is principally Union Pacific business from its own stations. What they buy from competitors is a very small percentage of their total business along the lines of the Union Pacific. They do some business with foreign lines in Nebraska, and also some business off of the lines in the western and northern part of Iowa, but I don't believe it amounts to over fifteen per cent of the total business done.

Q. Then about fifteen per cent of the total business you have comes in over foreign lines?

253 A. Yes sir.

Q. And eighty five per cent came in over the Union Pacific? A. Yes sir, Union Pacific business.

Q. Now, what do you know about the length of time that this grain during 1906 and 1907, that came in over the Union Pacific, remained there in the elevator before it went out?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

The Court: At present I don't see where it is material.

Mr. Smith: I think that is right, I don't think I ought to put the question at this time. I will withdraw it for the present.

Q. Now, during the years 1906 and 1907 did you have anything to do with preparing and presenting to the Union Pacific Railroad Company the claims of the Omaha Elevator Company for this elevation allowance? A. Yes sir.

Q. What part did you take in the preparation of those claims?

A. At the time this tariff was issued Mr. Anderson and myself got together and we had a little meeting in his office one afternoon and decided on the form to be used for drawing up these claims. That form I understand is still being used by the various companies, and after adopting this particular form I made up the claims in the office with the assistance of the bookkeeper from our shipping and receiving books.

Q. You and Mr. Anderson did this after the publication of this tariff 888? A. Yes sir.

254 Q. Now did you present and receive payment from the Union Pacific, in the years 1906 and 1907, of all or a portion of these claims of the Omaha Elevator Company?

Mr. Rich: Objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Defendant excepts.

A. Our method of collecting these claims was to file a claim every two weeks covering the period of business—or the business transacted during that time. At the end of the two weeks we presented the claims and if they were not paid within thirty or sixty days would personally call on Mr. Anderson and find out why they had been delayed.

Q. Did you personally assist in the making up of the claims? A. Yes sir.

Q. Getting the claim in shape? A. Yes sir.

Q. Now while this tariff 888 was in effect, and before it was superseded by 904, at what rate per hundred pounds did you present your claims?

A. Prior to the issuance of this tariff of June 26th?

Q. No, after the issuance of 888, and before it was superseded by 904? A. One cent and a quarter.

Q. And while 888 was in effect and before it was superseded by 904 you made up these claims at the rate of a cent and a quarter per hundred pounds? A. Yes sir.

255 Q. Have you any personal knowledge of the payment of those claims that are shown in Plaintiffs' Exhibit 4 that was presented by Mr. Anderson this morning?

A. I believe I have. One or two I remember very distinctly on this statement.

Q. Do you remember that first one? A. Yes sir.

Q. That is fifteen thousand and something?

A. Yes sir, $15561.89.

Q. Did you personally collect that? A. Yes sir.

Q. The voucher was given to you? A. Yes sir.

Q. And was that figured on the basis of a cent and a quarter per hundred pounds on the grain that had been elevated?

A. I think it was, yes sir.

Q. 888 was superseded by 904—904 became effective May, 1907, so during the year 1906 up to May, 1907, they paid on the basis of a cent and a quarter. Prior to that time 888 was in effect and that provided a cent and a quarter allowance?

A. Yes sir.

Q. Did they pay this elevation during that time on the basis of a cent and a quarter a hundred?

A. I understand so, yes sir.

Q. Was that the basis on which you made up the claims against them? A. Yes sir.

Q. Did you ever know of any of those claims being cut down? A. Possibly in one or two instances.

256 Q. In what way were they reduced?

A. From the very fact that the cars were not returned in—no, that was all claims when the three-fourths of a cent allowance was permitted. I don't recollect any being cut out during the cent and a [illegible]rter period.

Q. Now, in making up these claims which were afterwards paid, did you include in that grain which arrived in Union Pacific cars, also grain that arrived in cars owned by lines here in Omaha, and grain that arrived over the Union Pacific cars that were owned by foreign lines having no connection in Omaha?

A. Those claims included all cars received off the line of the Union Pacific Railroad Company.

Q. Irrespective of the ownership of the car? A. Yes sir.

Q. And paid on the same basis? A. Yes sir.

Q. The Union Pacific didn't cut out of your claims allowances on cars belonging to the Burlington or the Rock Island or the Milwaukee? A. No sir.

Q. And they didn't cut out of your claim elevation on cars belonging to the New York Central, Baltimore & Ohio, Pennsylvania, or anything of that kind? A. No sir.

Q. Those were paid the same as the grain received in the Union Pacific equipment? A. Yes sir.

Q. In that did you include cars belonging to eastern lines having connection in Omaha, which cars had been re-
257 ceived over the Union Pacific, and which cars when made empty were immediately loaded out by the Omaha Elevator Company to some point east or south?

A. Yes sir.

Q. If a Baltimore & Ohio car arrived over the Union Pacific and was unloaded at that elevator, then immediately loaded out with the same kind of grain, or some other kind of grain for that matter, for Chicago or the east, did they pay elevation allowance on that car?

A. Frequently we loaded cars before they had left the elevator and pulled them out over any line we saw fit.

Q. My question was if a Baltimore & Ohio car arrived over the Union Pacific and was unloaded at that elevator and immediately loaded out with the same kind of grain, or some other kind of grain for Chicago or the east, did they pay elevation allowance on that car? A. Yes sir.

Q. By that you mean they paid elevation allowance on the car as it came in?

A. On the amount of grain received at the house.

Q. They didn't pay elevation allowance on out-going stuff? A. No sir.

Q. Is that true of all foreign cars which were loaded out east or south after being made empty? A. Yes sir.

Q. How about Burlington, or Milwaukee or Rock Island cars which were being made empty by you at that elevator, and afterwards turned over to the owner of the car—did you get your elevation allowance on that?

258 A. Yes sir.

Q. For instance, if a Burlington car came in over the Union Pacific, and you unloaded it, and after it was made empty it was turned back by the Union Pacific to the Burlington, did you get your elevation on that? A. Yes sir.

Q. That is true of all these lines that center in Omaha?

A. Yes sir.

Q. Was there any kind of car or equipment during that time that you didn't get elevation on? A. No sir.

Q. No matter what became of the car after it was made empty? A. No sir.

Q. Those cars that were received at that elevator as they came in over the line of the Union Pacific, if coming from stations west of Gilmore, would they at any time be on the track of any other road? A. I don't think so, no sir.

Q. If car were loaded on the Union Pacific any place west, Columbus, Grand Island or any place west that way, and came to the Union Pacific, they would be on the Union Pacific track all the time from the time the car was loaded until you made it empty? A. Yes sir.

Q. So in that respect there was no such thing as returning the car to the Union Pacific—it was in its possession all the time? A. Yes sir, all the time.

259 Q. On its tracks all the time? A. Yes sir.

Q. At that time how did the Union Pacific ascertain the weight of the contents of the car in order to determine the amount of freight that should be paid?

A. It collected the freight charges on the official Grain Exchange weight certificate.

Q. And that official Grain Exchange weight certificate was made where? A. At the Peavey elevator.

Q. By that you mean the Omaha elevator? A. Yes sir.

Q. You call it the Peavey elevator—by that you mean the elevator of the Omaha Elevator Company? A. Yes sir.

Q. When this grain was purchased in carload lots on what was the settlement made with the party from whom it was bought? A. Grain Exchange weights and grades.

Q. And these Grain Exchange weights were determined over there at your elevator? A. Yes sir.

Q. The Omaha Grain Exchange kept a weighmaster there, did it?

A. Kept a tally-man there to check weights on every car.

Q. And those weights were accepted by the Omaha Elevator Company as the weights on which to make a settlement with the party from whom they bought it? A. Yes sir.

Q. And that was accepted by the Union Pacific as the
260 weights on which to settle and collect their freight charges? A. Yes sir.

Q. And that was so during 1906 and 1907?

A. Yes, sir.

Cross Examination

By Mr. Rich:

Q. Who owned the ground on which your elevator stood?

A. Well, I don't know as I can state positively. I believe the Union Pacific Railway own the ground and it is leased by the Omaha Elevator Company.

Q. Leased by the Omaha Elevator Company?

A. It was on this side of the river; now I couldn't say positively as to the location on the east side.

Q. You don't know that was sold to Mr. Peavey, do you, on which to build that elevator?

A. No, I don't, I have no knowledge of that.

Q. Who owned the track that ran through the elevator on which you unloaded these cars? A. I can't state.

Q. You don't know whether the elevator owned the track or not? A. No sir.

Q. And you don't know whether the company owned the ground on which the elevator stood?

A. No sir, I couldn't state positively.

Q. Did you ever see the contract between the Union Pacific and Mr. Peavey—and the Omaha Elevator Company?

A. Not regarding the location of that property, no sir.

Q. What contract did you ever see?

261 A. I recall seeing a contract at the time that elevator was erected between Mr. Peavey and the Union Pacific Railroad.

Q. And you read the contract?

A. Well, I believe I did, yes sir.

Q. Didn't that contract contain the agreement that so much ground—so many thousand square feet—should be sold to Mr. Peavey at such and such a price?

A. Possibly it did, I don't recall.

Q. Did that contract contain anything about who should own that track on the ground that became Mr. Peavey's?

A. I don't know that. I know this, that the Union Pacific kept the track in repair without any charge to us.

Q. But you wouldn't say who owned it? A. No sir.

Q. Now you say when you unloaded a car you pushed it out on the track south of the elevator? A. Yes sir.

Q. The Union Pacific would go there and get the cars and take them away? A. Yes sir.

Q. So when you said that the cars were on the Union Pacific tracks all the time you don't know whether that is so or not?

A. Technically, no I don't; but I know this, that the Peavey elevator tracks are connected only with the Union Pacific track.

Q. They are connected, that is true; but that track in your elevator where the car stood when it was unloaded, you don't know whether that is a Union Pacific Company track or a Peavey track.

262 A. No, I could not state whether it was a Union Pacific track or a Peavey track.

Q. When you state that the cars stood on the Union Pacific tracks all the time you might be mistaken about that, mightn't you?

A. Practically I couldn't see but what they were in the possession of the Union Pacific all the time.

Q. If the track was owned by you and the car stood on your track in your elevator it wasn't on Union Pacific track, was it?

Mr. Smith: That is objected to as immaterial and not proper cross-examination. The petition alleges that the elevator of the Omaha Elevator Company is located on Union Pacific tracks and the answer admits it.

The Court: Well, if that is the state of the pleadings—

Q. You say when you unloaded a car you pushed it out on a track which you did suppose the Union Pacific owned without any question, didn't you? A. Yes sir.

Q. And you thereby delivered that car to the Union Pacific after it was unloaded, didn't you?

Mr. Smith: That is objected to as not proper cross-examination, and calling for a conclusion of the witness.

The Court: Show the facts and the jury may determine the question, if it becomes necessary, as to whether it was delivered to the Union Pacific and when it was delivered to the Union Pacific.

Q. You used to make up those claims yourself?

A. I did.

Q. With the assistance of the bookkeeper?

263 A. Yes sir.

Q. Were you familiar with the tariff and the contract under which you were making these claims?

A. To a certain extent, yes sir.

Q. You made up the claims for every car, did you, that you have ever unloaded? A. From off the Union Pacific road.

Q. From off the Union Pacific? A. Yes sir.

Q. Did you buy grain over in Iowa that came over the Wabash, Illinois Central, or any other road, that was switched about by the Union Pacific? A. Yes sir.

Q. Did you make any claim for any cars that came in in that manner? A. Not against the Union Pacific, no sir.

Q. Not against the Union Pacific? A. No sir.

Q. Did you collect an elevation charge from other roads on those cars?

Mr. Smith: That is objected to as immaterial and not proper cross examination.

Objection sustained. Defendant excepts.

Q. Now you say you frequently loaded cars before they left the elevator, after they had been made empty?

A. Yes, sir.

Q. And you knew the provisions of the tariff, did you?

A. Yes sir, I believe we did.

264 Q. You knew then, when you did that you were practicing a fraud on the Union Pacific?

Mr. Smith: That is objected to as not proper cross-examination, and assuming something for which no foundation exists in truth.

Objection sustained. Defendant excepts.

Q. Who directed the claims made up of that character?

A. The General Manager of the Company.

Q. And you made up and presented them, did you?

A. Yes sir.

Q. And you made up those claims on the car that was reloaded and never left the elevator after it was reloaded—you did that, did you?

A. You mean that the empty never left the elevator?

Q. You made the claim on that car which you unloaded and never pushed out on the Union Pacific but immediately reloaded it, you put in a claim for that?

A. Never left the elevator track?

Q. Yes, never left the elevator track?

A. Yes, we did.

Q. You put in a claim on that? A. Yes sir.

Q. What did you file with those claims as evidence that the claim was correct—did you swear to them?

A. No sir, the claims were checked up by Mr. Fisher, Agent of the Transit Inspection Bureau; we furnished the details and in and out-bound reference.

Q. After those cars had been pushed out of the elevator onto a track—delivered, as you supposed, to the Union Pa-

265 cific Railroad, and you wanted to load one of those cars, how did you get it back?

A. We pulled it back with our car-puller.

Q. Pull it back with a rope?

A. Yes sir. Frequently we phoned Mr. Lincoln's office and requested that we be permitted to load a certain number of cars south of the house, being short of empties, and he granted the permission.

Q. You would get permission to do that? A. Yes sir.

Q. Did you state, in answer to a question by Mr. Smith, that none of the claims you filed were declined?

A. I don't recall any of them being declined, no sir. Up to the time I left the company they were all paid.

Q. They were all paid?

A. There was one or two where there was a few exceptions made.

Q. What were those exceptions?

A. For instance, if a car wasn't loaded and unloaded within the forty eight hour limit of your tariff, those cars were cut out of the claim.

Q. And there were cars of that kind cut out of your claims by the Union Pacific?

A. Oh, I should say twenty five cars during my experience in handling those claims.

Q. You may examine Plaintiffs' Exhibit 4 and 5, and see if there is a claim there showing the items of elevation allowance refused on cars because they were not unloaded within the 48 hours? A. Yes sir.

266 Q. There is such a showing on these exhibits?

A. Yes sir.

Re-direct Examination

By Mr. Smith:

Q. When those claims were presented by you to the Union Pacific, Mr. Rich asked you what proof you submitted—did the form of the claim as you presented it show the "in billing"?

A. Yes sir.

Q. What do[—] mean by the in-billing?

A. That shows the point of origin—the date it was billed from the point of origin.

Q. And the car number and initial? A. Yes sir.

Q. In which it was received? A. Yes sir.

Q. Did it also show the out-billing of that same stuff?

A. Yes sir.

Q. And did that out-billing show the number and initial of the car in which it went out?

A. Yes sir, and also the date and destination, and to whom it was consigned.

Q. The proof you submitted to the company would show the number of the car in which it came, and the number of the car in which it went out? A. Yes sir.

Q. That was all furnished to them before they paid any of those claims?

267 A. That was furnished on this form adopted by the Union Pacific and checked by Mr. Fisher.

Q. Who was Mr. Fisher?

A. Agent of the Traffic Inspection Bureau here.

Q. What did he do about those claims?

A. At the time we billed this grain out of Omaha we were compelled to attach the original expense bill or the shipping notice showing the in-bound reference. That was attached to

duplicate bills of lading and sent to Mr. Fisher's office to be checked and OK'd by Mr. Fisher. Those expense bills are held by Mr. Fisher and when claims are presented they are checked against the files in the Union Pacific office.

Q. So he required proof of the grain from point of origin, and proof of the fact that it had gone out? A. Yes sir.

Q. And included in that was the car number and initial in which the grain was received? A. Yes sir.

Q. The car number and initial in which it went out?

A. Yes sir.

Q. How many cars would the tracks adjacent to the elevator over there accommodate, how many loaded cars over there could be received at once?

A. We could accommodate 65 to 90 cars on the receiving tracks.

Q. Were there times when you had more grain than you could put on the tracks?

A. Yes sir, I have seen a time when we had two or three hundred cars between there and Gilmore.

268 Q. What was done with them if those tracks were full?

A. They were held on side tracks until we could receive them on the elevator tracks.

Q. Then were held until you got so you could handle them?

A. Yes sir.

Q. Now, then, as to the cars which remained on the side track until you got so you could take care of them on your elevator track—were any of those cars that had come in over the Union Pacific? A. Yes sir.

Q. Did the Union Pacific Company have any one over there to check the time of the arrival of those cars?

A. That is, you mean the time they were delivered to our unloading track?

Q. Yes? A. I think they did, yes sir.

Q. Those cars which remained on a side track for a time and were then placed over on your unloading track, they kept the time they were placed on the unloading track?

A. Yes sir.

Q. Did they pay elevation on those?

Mr. Smith: Objected to as immaterial.

Objection overruled.

Plaintiffs except.

A. If the car originated on the line of the Union Pacific they paid elevation on all cars.

Q. Did the Omaha Elevator Company ever get—did it have a switch engine over there of its own? A. No sir.

Q. So the movement of cars there to and from the
269 elevator was attended to by whom?

A. Union Pacific Railroad Company.

Q. I suppose when cars were unloaded you did shove those around by tackle, didn't you?

A. Occasionally we would run the first car, if the track was empty would go down to the end of the track and then they would send a switch around to pull the track.

Q. You could move a car into or out of your elevator by tackle you had there—ropes and so forth? A. Yes sir.

Witness excused.

270 Lawrence Kearney, a witness on the part of the plaintiffs, having been heretofore called, sworn and examined as hereinbefore set forth, is at this time recalled for further examination in chief by Mr. Ed. P. Smith, and testified as follows:

Q. Mr. Kearney, during the years 1906 and 1907, did the Union Pacific Railroad Company maintain down there at your elevator any employee, or any person who performed any work down there? A. Yes sir, they did.

Q. What did they have—what did he do?

A. His duty, as I understand it, was to check the arrival of Union Pacific cars, the time they were set on our unloading tracks and the time they were unloaded.

Q. Was he there every day? A. Yes sir.

Q. Did he keep a record of the time the cars were set there on your unloading track, and the time of the day and hour when you unloaded them? A. Yes sir.

Q. Was that merely on cars that came in over the Union Pacific? A. Yes sir.

Q. It included all cars arriving on the Union Pacific?

A. Yes sir.

Q. Whether they were Union Pacific cars or foreign cars, or what not? A. Yes sir.

Q. All cars arriving over the Union Pacific they kept tab on them? A. Yes sir.

271 Cross Examination waived.

Witness excused.

At this time five o'clock P. M., an adjournment was taken until 9:30 o'clock tomorrow morning, May 14, 1909, at which time Court convened pursuant to adjournment and further proceedings were as follows:

272 Christopher C. Crowell, Jr., is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed P. Smith, he testified as follows:

Q. What is your full name?
A. Christopher C. Crowell, Jr.
Q. You are connected with the Crowell Lumber & Grain Company? A. Yes sir.
Q. In what capacity?
A. Vice President and Manager of the Grain Department.
Q. Does the Crowell Lumber & Grain Company operate a transfer elevator? A. Yes sir.
Q. Where is it located?
A. At 14th and Ohio streets on the C. St. P. M. & O. tracks.
Q. In Omaha? A. Yes sir.
Q. That is generally referred to as the M & O?
A. Yes sir.
Q. Were you operating that transfer elevator in the years 1906 and 1907? A. Yes sir.
Q. You built it in the year 1906? A. Yes sir.
Q. Began operating it in the fall of that year?
A. Yes sir.
Q. At that elevator did you receive grain in the years 1906 and 1907?
273 A. Yes sir.
Q. Did you buy and receive grain there other than in carload lots? A. No sir.
Q. Simply handled carload lots? A. Yes sir.
Q. Does the Crowell Lumber and Grain Company operate any elevators out in the state? A. Yes sir.
Q. How many? A. Eighteen.
Q. Are any of them on the line of the Union Pacific?
A. No sir.
Q. On what line of road are they?
A. The Northwestern System.
Q. The M & O is a part of the Northwestern System?
A. Yes sir.
Q. During the years 1906 and 1907 did your company purchase grain from stations or from parties along the line of the Union Pacific? A. Yes sir.
Q. Did you receive at your elevator here in Omaha shipments of grain off the line of the Union Pacific? A. Yes sir.
Q. Where did you purchase that grain and how did you buy it?
A. On the floor of the Grain Exchange and in some cases on bids to the country, and over the telephones to the country dealers.
Q. You buy from those along the line of the Union Pacific who do operate country stations?

274 A. Yes sir.

Q. And from those on the Exchange who buy along the line from the country stations? A. Yes sir.

Q. How does the grain that arrives over the Union Pacific reach your elevator?

A. It is switched by the Union Pacific to the M & O near the Union Pacific shops.

Q. And there the car is picked up and placed to your elevator? A. Yes sir.

Q. By the M & O? A. Yes sir.

Q. The Union Pacific has a transfer track near the Union Pacific shops on which they place freight that is intended for industries or elevators on the line of the M & O?

A. That is my understanding.

Q. Now is there a charge connected with the movement of that car to the Union Pacific to your elevator? A. Yes sir.

Q. Who collects pay for that movement?

A. The Union Pacific.

Q. Did the M & O during this period of time, collect anything from you for the movement of that car either to or from the Union Pacific? A. I think not.

Q. And the switching charge, or other charge, that was made for the movement of that car to your elevator, and taking it away, and so on, was paid by you to the Union Pacific, was it? A. Yes sir.

275 Q. During this period of time did you receive grain at your elevator that came off the Union Pacific in different kinds of cars, as to ownership? A. Yes sir.

Q. Were part of them Union Pacific cars?

A. A very few.

Q. What were the others as to ownership?

A. All roads nearly; Baltimore & Ohio, Pennsylvania and New York Central, for instance.

Q. Were there some of them M & O cars or Northwestern cars? A. Yes sir.

Q. Were they each and all unloaded at your elevator?

A. Yes sir.

Q. What orders or directions, if any, would you give to the M & O with respect to the movement of a car to your elevator, when it is loaded with grain?

A. Over the Union Pacific you mean?

Q. Yes.

A. We notified the M & O "We have ordered cars over from the Union Pacific", and notified them to set the cars to our elevator.

Q. If you bought a car of grain on the floor of the exchange that came in over the Union Pacific, and bought it from some

person on the floor of the exchange, would the bill of lading be delivered to you? A. Yes sir.

Q. Then what would you do with that?

276 A. We attached a switching order to that and delivered it to the Union Pacific.

Q. Delivered it to the Union Pacific? A. Yes sir.

Q. And on that switching order is the car then moved to your elevator? A. Yes sir.

Q. Now what did you do, during that period of time, with Union Pacific cars when you made them empty?

A. We requested the M & O to return them as promptly as possible.

Q. To the Union Pacific? A. Yes sir.

Q. What was done with the M & O cars and Northwestern System cars when they were unloaded?

A. I presume they were retained by the M & O.

Q. I believe you didn't make any claims on any cars that you loaded out south? A. No sir.

Q. No, that is not in your claim. Now, as your elevator was located and equipped at that time, how many unloading places did you have? A. One.

Q. What is the capacity of your elevator?

A. One hundred thousand bushels.

Q. You had just one track on which you could unload?

A. Yes sir.

Q. And just one place at which you could unload?

A. Yes sir.

277 Q. So you couldn't unload two cars at the same time?

A. No sir.

Q. About how many cars could you unload a day?

A. Twenty.

Q. Do you unload with those electric shovels?

A. Yes sir.

Q. The same as those described by Mr. Davis as being in the Nebraska-Iowa Grain Company's elevator?

A. Yes sir.

Q. About how many cars did you usually receive during a day?

A. I think probably we averaged seven or eight cars a day through the year.

Q. Now, how long would those cars that came in off of the Union Pacific—how long did they remain on your track, after they had been switched to your elevator by the M & O, before they were unloaded?

A. A very short time, as a rule I would say two hours, possibly.

Q. If a number of cars were set in, possibly, five, or ten or a dozen, what was the procedure by which they were unloaded—describe to the jury how you did it?

A. They were unloaded in the order in which they were set on the unloading track.

Q. What time of the day or night were those cars usually placed by the M & O on your track?

A. That differs a good deal, I couldn't say positively.

Q. Did they place them in the day time or at night?

A. Very often in the forenoon.

Q. Are they ever placed in the night?

278 A. Yes sir.

Q. So that you found them there in the morning when you got down? A. Yes sir.

Q. If you had six, or eight, or ten or a dozen cars there on the track, the one nearest to the elevator you would unload that first, would you? A. Yes sir.

Q. Now, how long will it take you to unload that individual car?

A. I should say a half hour on the average.

Q. Then when it is unloaded what is done with it?

A. It is pushed from there down the track.

Q. And the next car is brought in and unloaded?

A. Yes sir.

Q. When that car is pushed out of your elevator after it is unloaded, what further did your company have to do with that empty car?

A. Nothing at all.

Q. You pushed it out of the elevator by men you had working there?

A. No, we have electric cable we do that with.

Q. Then you pull in another one in the same way?

A. Yes sir.

Q. Then the next car would go through the same procedure, would it? A. Yes sir.

Q So that the first car you began unloading after the day's work commenced, or after the car was placed, would be unloaded and disposed of in half an hour or such a matter?

A. Yes sir.

Q. The last one in the string would require a greater length of time?

279 A. Yes sir.

Q. What would you say was the longest time that any of those Union Pacific cars remained on your track by the elevator after it was set by the M & O and before it was unloaded, cars brought in over the Union Pacific line, how long would they remain there before being unloaded?

A. Possibly eight or ten hours. It would depend upon whether the machinery in the elevator was working properly or not.

Q. Would you say that would be the longest time?

A. Yes sir.

Q. And all those cars, after being made empty, were shoved out of your elevator on to the track?

A. Yes sir.

Q. And that was the last your company had anything to do with it? A. Yes sir.

Q. Did you prepare your claim, or the claim of your company, against the Union Pacific for those elevation allowances on those cars received over the line of the Union Pacific that you unloaded there?

A. Yes sir, I had it prepared.

Q. It was prepared by some of the assistants in your office, was it? A. Yes sir.

Q. Was that prepared on those forms or blanks that were approved by the Union Pacific? A. Yes sir.

Q. Do you know whether or not those claims were then referred to Mr. Fisher, the joint agent of the Traffic or Transit Bureau? A. Yes sir.

280 Q. I don't know whether I have his title right—what is his title—what do you call him?

A. Why Agent of the Transit Inspection Bureau I always called him.

Q. And he is the one that checked them up for all those different companies? A. Yes sir.

Q. Yours were checked up by him, were they?

A. Yes sir.

Q. Were any of those paid? A. No sir.

Q. Has the Union Pacific ever paid your company any of those allowances for the elevation of any of this grain at your elevator? A. No sir.

Q. No matter whether the cars were returned within the forty-eight hour period or not, they have not paid any of it?

A. No sir.

Q. You made a demand on them for the payment, did you?

A. Yes sir.

Q. What efforts did you make to get those cars that came in off of the Union Pacific, when emptied by you, returned to the Union Pacific within the forty-eight hour period, or as soon as you could—what did you do?

A. We took it up with the switching crews and told them that it was very important that the cars be hurried back, and I think I talked to some of the officials about it too, although I am not positive.

281 Q. Were those cars, when placed on your track as they came in off of the Union Pacific, unloaded by you at your elevator, just as soon as you could get to them and get them unloaded?

A. Yes sir, in fact we gave them preference. Before the cars were set to the elevator we requested that the Union Pacific cars be hauled up first.

Q. You did everything in your power to get them unloaded and get them back? A. Yes sir.

Cross Examination

By Mr. Rich:

Q. How many cars did you fail to get back within the 48 hours?

A. I am not sure, but I think probably thirty or forty out of the hundred that were filed.

Q. What kind of business do you conduct up at your elevator? A. Grain business.

Q. General grain business? A. Yes sir.

Q. What is your company—a corporation? A. Yes sir.

Q. Did you do a general storage business up there for the public? A. No sir.

Q. Does your company own all the grain that goes into your elevator? A. Yes sir.

Q. And did it during the period covered by your claims?

A. Yes sir.

Q. Did you pay any of those switching charges you have told about, to the M & O?

282 A. No sir, not to my knowledge.

Q. Those switching charges, however, were paid back to you by the railroad that carried your grain to the east, were they not?

A. They were absorbed by the out-going road.

Q. So that while you paid the Union Pacific, as a matter of convenience, these M & O switching charges, when your grain moved out the railroad that carried your grain paid those charges back to you? A. Yes sir.

Q. Now, did you weigh your grain up at your elevator?

A. Yes sir.

Q. Was there any inspection of the grain up at your elevator?

A. The official inspection was before it got to the elevator.

Q. Did you mix your grain up there before you sent it out, to make the color better or the grade more uniform, or anything of that kind?

A. It is impossible to keep it all separate. We have only a very few bins.

Q. So you did mix your grain?

A. To some extent, yes sir.

Q. Did you treat your grain in any way—dry it or clean it?

A. We have no facilities for drying, but ocasionally we clean a car.

Q. Other roads brought grain to your elevator?

A. Yes sir.

Q. And you didn't receive anything for unloading the cars from other roads?

Mr. Smith: That is objected to as not proper cross-examination, as immaterial, irrelevant and incompetent.

283 Objection sustained. Defendant excepts.

Q. You would have unloaded this grain and bought the grain on the Union Pacific, even though there had not been this provision of the tariff making this allowance for unloading the grain sent you, wouldn't you?

Mr. Smith: Objected to as immaterial and irrelevant.

The Court: The objection is sustained.

Mr. Rich: On what ground?

The Court: On the ground that this suit is based—on the basis of discriminating in the treatment of your customers, and it is immaterial whether one customer would have done business just the same notwithstanding the discrimination. That is not a justification for the discrimination if a discrimination existed.

Mr. Rich: Well, that brings us right back to the petition again; I have gone over it carefully this morning and there is no allegation of discrimination, except with reference to the 48 hour period.

Mr. Smith: Oh yes, there is.

Mr. Rich: Well, I wish you would get it and read it to the Court.

Mr. Smith: Why it is in paragraph 7 of the petition, and I will read that.

(Mr. Smith reads to the Court paragraph seven of the petition).

The Court: It becomes immaterial, in any view of the case, as to whether these people would have done business
284 notwithstanding the non-payment of these elevation charges. The suit is based on the proposition, and a recovery must be had, if at all, as I view it, on the proposi-

tion that the defendant has discriminated between patrons of its road, in that it paid some of them the elevation charges and did not pay it to others. If that is not true then plaintiff must fail, but it is immaterial, it seems to me, even though that is not charged, as to whether these people—these complainants—could have done business or would have done business without reference to this. It is wholly immaterial.

Mr. Rich: Your Honor holds, as a matter of law, that even though the elevations were paid to elevators on Union Pacific lines, payments made in good faith and under a tariff were in fact illegal and void, and that the Union Pacific, as a matter of law and under the rulings of the Interstate Commerce Commission, can sue these elevators and recover the amounts paid?

The Court: I have not decided anything of the kind yet because we have not reached that point. What I have decided is your question as to whether these people would have done business, even though this elevation charge was not involved—I think that is wholly immaterial—wholly immaterial.

Mr. Rich: Very well, we will take an exception.

The Court: I think it is wholly immaterial in any view of the case—in either view of the case.

285 (Mr. Rich continues):

Q. You say you gave the bill of lading to the Union Pacific when you ordered the cars switched? A. Yes sir.

Q. When you bought grain out on the Union Pacific, what were the terms of the billing?

A. If we bought it direct from the country it was billed direct to our elevator.

Q. At Omaha? A. Yes sir.

Q. It wasn't on through billing? A. No sir.

Q. Did you ship all of this grain out of your elevator within ten days?

Mr. Smith: Objected to as immaterial.

Objection sustained. Defendant excepts.

Q. Has any part of those claims against the Union Pacific that you are suing for in this case ever been paid to you by any other railroad? A. No sir.

Q. Have you any agreement with any other railroad that they shall pay to you, if you do not recover them from the Union Pacific? A. No sir.

Q. Is there any other tariff with any other railroad—of another railroad company—over which you are shipping, that provides that that railroad shall pay them to you?

Mr. Smith: That is objected to as not the best evidence, not proper cross-examination and immaterial.

The Court: The objection will be sustained.

Defendant excepts.

286 Q. Did you know of this tariff when you were unloading the cars of grain? A. Yes sir.

Q. That you are suing for here? A. Yes sir.

Q. You had been advised of it? A. Yes sir.

Q. When did you begin to do business out at your elevator? A. I think in August, 1906.

Q. So you have no claim prior to August, 1906?

A. No sir.

Q. You are storing grain in your elevator for the general public? A. No sir.

Re-direct Examination

By Mr. Smith:

Q. Where was this grain weighed? A. In our elevator.

Q. By whom?

A. The Grain Exchange—under the supervision of the Grain Exchange.

Q. On what weights did you settle with the person from whom you bought the grain?

A. On the Grain Exchange official weights.

Q. And on what did the Union Pacific ascertain the weight of the grain, so as to determine the amount of the freight charges? A. On the Grain Exchange official weights.

Q. That is weighed, not by an employee of yours, but by a person designated by the Omaha Grain Exchange?

287 A. Yes sir.

Q. And where was the grain inspected?

A. I don't know, I think in the Union Pacific yards.

Q. Is it inspected before it reaches your elevator?

A. Yes sir.

Q. By whom?

A. By an inspector of the Omaha Grain Exchange.

Q. So in your elevator, as in all these others, the inspection and weighing of grain is done by a party wholly disconnected with your company? A. Yes sir.

Q. Someone designated by the Omaha Grain Exchange?

A. Yes sir.

Q. In the case of grain sold, and shipped to go east or south, is the inspection and weighing of grain done by these same parties? A. Yes sir.

Q. So they weigh and inspect the stuff that you buy, the stuff you sell, and you have to sell and buy on their weights and inspection both ways? A. Yes sir.

Witness excused.

288 Arthur English is here called and sworn as a witness on the part of the plaintiffs. Being examined in chief by Mr. Ed. P. Smith he testified as follows:

Q. Your full name is Arthur English?

A. Arthur English.

Q. Were you ever connected with the Nebraska-Iowa Grain Company? A. Yes sir.

Q. In what years? A. 1906 and 1907.

Q. Are you connected with it now? A. No sir.

Q. And have not been for what length of time?

A. Since November, 1907.

Q. When you were connected with the company, in what capacity were you connected? A. I was Treasurer.

Q. Did you have anything to do then with the active management of the business of the company? A. Yes sir.

Q. Now during the years 1906 and 1907, did you have personal knowledge of the receipt by the Nebraska-Iowa Grain Company of carloads of grain coming over the line of the Union Pacific? A. Yes sir.

Q. And being unloaded at the elevator of the Nebraska-Iowa Grain Company? A. Yes sir.

Q. Was the matter of the time in which this stuff should be unloaded and the cars returned to the Union Pa-

289 cific, and when the 48 hour provision applied, or to what it applied, ever a matter of conversation between yourself and officials of the Union Pacific while this grain was being handled down there?

A. Yes sir.

Q. With whom did you take it up? A. Mr. Lane.

Q. Who is Mr. Lane?

A. He is General Freight Agent of the Union Pacific, or the Assistant General Freight Agent.

Q. What are his initials, do you know?

A. Charley Lane.

Q. Is that the Mr. Lane that is referred to in these tariffs as Charles J. Lane, First Assistant General Freight Agent of the Union Pacific? A. Yes sir.

Q. You know him personally, do you? A. Yes sir.

Q. Now, what was said by him as to what that 48 hour provision—as to time—when it began and when it ended, and what it applied to?

Mr. Rich: That is objected to as incompetent, irrelevant and immaterial.

Objection overruled.

Defendant excepts.

A. After the claim was made, which I personally made, I had some correspondence with Mr. Lane, and we didn't get the money so I went down to talk it over with him, and asked him why the claim couldn't be paid, and he said it was in the hands of the Legal Department and if it wasn't for that it would have been paid. He said he was in favor of
290 paying it right away but he thought it would take a few weeks before they would pass it back to the Freight Department, and that they would then pay it. So I asked him what construction he put on the clause, and whether he considered it was the intention in that clause to work a hardship on us by holding us responsible for delay and negligence on the part of the Burlington switching crew, and he said, "No, by no means". He says the intention of that clause was to reward us for being prompt in unloading cars, and that if the cars were set into our elevator and were unloaded promptly and handed back to the Burlington that we had earned the reward which they wanted to give us in that tariff. Then if the Burlington, for some reason, did not return the car, we were helpless and should not suffer the consequences. I asked him what construction he put on it in the case where, for instance, a car was delivered to us, promptly unloaded and set back—given back to the switching crew—and the Burlington, as sometimes was the case during that time, wanted cars badly, and they took cars from one another—as they termed it at that time "stole each other's cars"—and in this case, for instance, we will say the car wasn't returned to the Union Pacific at all but was taken by the Burlington and used elsewhere; I asked him what he thought would be the result, whether we should lose our elevation because the Burlington road took the car, arbitrarily, which should have gone back to the Union Pacific, and he says, "Why, no", he says that would be very unreasonable and that the Freight Department wouldn't for a minute consider that we should suffer the consequences. I asked him also, what he thought in case a car was unloaded in the proper time and given back to the Burlington, and when that got down to the transfer
291 they would find the transfer full of cars, and the car would have to set out over night on their tracks because the transfer was congested, and thereby lose the 48 hours. He said he considered that it would be the same result, that we should not suffer, and that it was the intention that whenever we did our duty and unloaded promptly within two, or three, or, four, or five, or six hours, that we should be held harmless and should not suffer by the delay.

Q. You are not in the railroad business? A. No sir.

Q. Your company—

A. I am in it in a little small way—

Q. I mean your company wasn't in the railroad business at that time?

A. No—he made that remark. He says: "Certainly you could not be responsible for the actions of the Burlington Road. You are not in the railroad business and it is". He even made the remark that he believed that where a car was returned within the forty-eight hours—that the intention of the road when they made that tariff, or of the department, was to simply make us unload those cars as quick as we possibly could under ordinary circumstances.

Q. Now what do you know about the Union Pacific, at that time, placing an employee at the elevator of the Nebraska-Iowa Grain Company to keep a record of the time the cars were placed at your elevator, and the time you unloaded and released the cars?

A. Yes sir, they had a man—the Union Pacific had a man at the elevator who had nothing to do there but to enter up the time cars were set in and the time they were unloaded ready to be taken out.

292 Q. And they maintained such an employee there at the elevator? A. They did at that time.

Q. Do you know whether or not he kept any record, also, of the time that car was placed on the transfer track, and the time it was returned to the transfer track?

A. I beg pardon, I didn't get the question.

Q. I say do you know whether or not that employee kept any record of the time that car was placed on the transfer track, and the time it was returned to the transfer track?

A. I don't know that he did—well, in fact he couldn't at the same time, but that never occurred to me.

Cross Examination

By Mr. Rich:

Q. What is the date of that conversation you say you had with Mr. Lane?

A. Well, I should say it was—I couldn't be very positive, but I should say the early part of 1907.

Q. Where?

A. In Mr. Lane's office in the headquarters.

Q. Who was there besides you and Mr. Lane?

A. Nobody but some of the help who were working in there—I think a stenographer, but there was nobody there who took any part in the conversation.

Q. Was there a lady stenographer sitting there part of the time? A. Well, I couldn't answer positively.

Q. You say there was a stenographer sitting there?

A. Well, I think there was, yes sir.

Q. Anybody else in the room?

293 A. I don't know. I wouldn't remember that—a year and a half you know.

Q. What time of the day was this?

A. I am not sure as to that, I think it was before noon.

Q. You had all this conversation with Mr. Lane?

A. Yes sir.

Q. No other official of the Union Pacific?

A. Well, I talked with Mr.—what was the gentleman's name? I met him in Munroes office—I know him well—

A. Garratt?

A. Garratt. I had some little talk with him, but we didn't go into details.

Q. Was that in the presence of Mr. Lane? A. No.

Q. Had your claims been disallowed and declined—any of them—at that time?

A. No. Part of them were allowed and part of them were cut out, or we were asked to cut out part of them because the time had expired.

Q. That is, because you had not returned the cars within 48 hours? A. Yes, that is what they claimed.

Q. Who asked you—what department asked you to cut those cars out?

A. The claim department. I think it was the claim department—I would ordinarily suppose it was.

Q. The freight auditor?

A. Possibly the freight auditor.

Q. And all cars that you had not returned within forty eight hours you were asked to take out of the bill?

A. Yes sir.

294 Q. And you think you were asked to do that by the auditing department?

A. Oh, I wouldn't say as to that. I don't remember anything about it, only I would say the claim department because it was that custom.

Q. Did you have any talk with anyone in the claim department or the auditing department with reference to that?

A. No sir, not that I remember of.

Q. And you did not go to the department that cut the items out, did you?

A. Not unless it was the freight department that asked us to cut them out. As I say, I am not sure and have no recollection as to who it was.

Q. Well, it wasn't Mr. Lane that asked you to cut them out of it, was it? A. I don't believe it was.

Q. Well, did you go to the parties that did ask you to cut them out?

A. No, I don't think I took into consideration who asked to cut them out. I think I went direct to headquarters to find out how they stood as to the interpretation of that clause.

Q. At that time, during the period covered by these claims, what was the general business conducted by this elevator?

A. By me?

Q. By the elevator?

A. Why, we were buying and shipping grain.

Q. Buying and selling grain? A. Yes sir.

Q. For the profit there was in it? A. Yes sir.

295 Q. Did the company own the grain that passed through that elevator? A. Yes sir.

Q. Did they do a general storehouse and warehouse business for the public? A. No sir.

Q. And for no other private individuals? A. No sir.

Q. The company owned all the grain that passed through there? A. Yes sir.

Q. In switching cars down to your elevator there was a charge made for that service, was there not? A. Yes sir.

Q. Do you remember what the charge was?

A. I think it was two dollars.

Q. You paid that to whom? A. The Union Pacific.

Q. Now when that grain moved out, the railroad over which the grain moved absorbed or rebated these switching charges to you, didn't it?

A. I think it did. It is a year and a half ago, so I wouldn't be positive, but I think it did.

Re-direct Examination

By Mr. Smith:

Q. You said, in answer to one of Mr. Rich's questions, that part of your claims were allowed. Did you mean they were paid? A. No, they were not paid.

296 Q. They were approved by Mr. Anderson?

A. Practically said they were ready to pay them if we would cut out the others.

Q. But as a matter of fact they never did pay any of the claims?

A. No sir; unless they have paid them since I left the company, they haven't paid them. They didn't pay them while I was with the company.

Witness Excused.

297 John A. Kuhn, a witness heretofore called, sworn and examined on the part of the plaintiffs, is at this time re-called for further cross-examination by the defendant. Being cross-examined by Mr. Rich he testified as follows:

Q. You are familiar with the character of the business conducted by the Updike Elevator Company, are you?

A. Yes sir.

Q. Was it, in a general way, the buying and selling of grain for pecuniary profit? A. Yes sir.

Q. Did the elevator at South Omaha, that you have testified about, store grain for private individuals?

A. I am not sure that any ever was stored, although a portion of the elevator was set aside for public storage.

Q. For that purpose? A. Yes sir.

Q. And all the grain that is included in these items was grain owned by the Updike Company? A. Yes sir.

Q. And all the business transacted, so far as you know or the grain that passed through the elevator was owned by the Updike Company? A. Yes sir.

Q. What was the form of the billing on which grain came to the Updike Elevator from points along the Union Pacific road—through billing, or billed to Omaha?

A. Some of it was billed direct to the Updike Grain Company, South Omaha, and some of it was billed to Omaha, purchased by us on the Exchange and then shipped.

298 Q. Destination, however, was Omaha?

A. Omaha or South Omaha.

Q. Did you pay any switching charges for the movement of that grain and the cars to and from the transfer track by the Stock Yards Company?

A. We paid no switching charges to the Stock Yards Company, no sir.

Q. Who did you pay it to?

A. If the grain came to Omaha we paid the Union Pacific a switching charge for switching it from Omaha back to South Omaha.

Q. From Omaha back to South Omaha. If it was put on the transfer track of the Stock Yards at South Omaha was there a switching charge? A. No sir.

Q. Was there a switching charge on the grain when it moved out? A. Yes sir.

Q. Did you pay that switching charge?

A. It depended entirely upon the destination of the grain.

Q. The grain that went east, you may state whether or not the road handling that grain absorbed or paid those switching charges?

A. If the grain went to what is known as Mississippi River Territory the roads leading out of South Omaha absorbed the switching charge. If it went to local points we were compelled to pay it.

Q. What do you mean by local points?

A. To any competitive point taking a rate less than what is known as the Mississippi River rate; for instance, Logan, Iowa. Red Oak, Iowa, on the Burlington, or Waldron, Missouri, on the Burlington.

Q. The grain shipped in that manner was not large in amount? A. No sir.

299 Q. Just for local purposes?

A. Yes sir, local consumption.

Q. Do you know whether the grain, or any of the grain—do you know whether the grain included in the bills which you have filed against the Union Pacific, and sued for in this case, was moved out of the elevator within ten days after it was put in there?

Mr. Smith: That is objected to as immaterial and not proper cross examination.

Objection sustained. Defendant excepts.

Witness excused.

Plaintiff rests.

300 Mr. Rich: The defendant now moves the Court for a peremptory instruction to the jury to return a verdict in favor of the defendant for the following reasons:

1st: For the reason that the petition does not state facts sufficient to constitute a cause of action against the defendant, and fails to state a cause of action on which a verdict might be predicated.

2nd: For the reason that the proof fails to sustain the material allegations of the petition, and is not sufficient to sustain a verdict in favor of the plaintiffs, or either of them, and against the defendant.

Before the Court ruled upon this motion the plaintiffs asked permission to withdraw their rest, for the purpose of introducing testimony as to the amount of grain which was shipped to points beyond Omaha and Council Bluffs.

The Court granted the request of the plaintiffs and permitted them to withdraw their rest, whereupon the defendant withdrew the motion for a peremptory instruction, as above set forth.

Further proceedings were then as follows:

301 John A. Kuhn, a witness on the part of the plaintiffs, having been heretofore called, sworn and examined as hereinbefore set forth, is at this time re-called for further

examination. Being examined by Mr. Ed. P. Smith, he testified as follows:

Q. You had charge, I believe you say, of the traffic department of the Updike Grain Company? A. Yes sir.
Q. And as such employee you were familiar with the shipment of grain from the elevators? A. Yes sir.
Q. What is the fact as to whether or not this grain that arrived over the Union Pacific in 1906 and 1907 was thereafter shipped out to points beyond Council Bluffs, Iowa?
A. It was.

Mr. Rich: I move to strike out the answer until I can make an objection.

The Court: The answer may be stricken out for the purpose of the objection.

Mr. Rich: I want to ask the witness a question.

The Court: Very well, you may do so.

Mr. Rich: Was there a record kept of this, a written record of all these cars with reference to the shipping out?

The Witness: A written record?

Mr. Rich: Yes; and of where the cars went to?

The Witness: Yes sir.

Mr. Rich: The defendant now objects to the last question propounded by counsel for plaintiffs, for the reason that
302 it is incompetent, irrelevant and immaterial, and not the best evidence.

The Court: The objection may be overruled. If he knows he may state the fact. It is not anything of which the law requires a record to be kept.

Defendant excepts.

(Mr. Smith continues the direct examination).

Q. What is the fact? A. Yes sir.

Cross Examination

By Mr. Rich:
Q. Did any of that grain go south to St. Louis?
A. Yes, I judge it did.
Q. Can you tell what part of it?
A. No, sir, without looking up the records

Q. Can you give the Court any idea of what part of it; did a good part of it go south to St. Louis?
A. Yes sir, there is no question in my mind.
Q. Over what road? A. Various roads.

Mr. Smith: I object to this as being immaterial and not proper cross examination.

(No ruling on the objection).

Witness excused.

303 Charles F. Davis, a witness on the part of the plaintiffs, having been heretofore called, sworn and duly examined, as hereinbefore set forth, is at this time recalled for further examination on the part of the plaintiffs. Being examined by Mr. Smith he testified as follows:

Q. Mr. Davis, what is the fact as to whether or not this grain which arrived over the Union Pacific, and which was elevated and transferred at your elevator during the years 1906 and 1907, and for which this claim is made—did that grain thereafter move to points beyond Council Bluffs, Iowa?
A. It did.

Cross Examination Waived.

Witness excused.

304 Christopher C. Crowell, Jr., a witness on the part of the plaintiffs, having been heretofore called, sworn and examined, as hereinbefore set forth, is at this time re-called for further examination on the part of the plaintiffs. Being examined by Mr. Smith he testified as follows:

Q. Mr. Crowell, did the grain that arrived over the Union Pacific in 1906 and 1907, and that was transferred at your elevator during that period of time, and for which the claim is made in this controversy, thereafter move to points beyond Council Bluffs, Iowa? A. Yes sir.

Cross Examination Waived.

Witness excused.

305 Plaintiffs rest.

Mr. Rich: The defendant now moves the Court for a peremptory instruction to return a verdict in favor of the defendant for the following reasons:

1st: For the reason that the petition does not state facts sufficient to constitute a cause of action against the defend-

ant, and fails to state a cause of action on which a verdict might be predicated.

2nd. For the reason that the proof fails to support the material allegations of the petition, and is not sufficient to sustain a verdict in favor of the plaintiffs, or either of them, and against the defendant.

Motion overruled.

To which ruling of the court the defendant excepts.

It is agreed that the 7th paragraph of the defendant's answer may be amended so that said 7th paragraph will read:

"This defendant admits the allegations in Paragraph Seven of the plaintiffs' petition, to the effect that from June 27, 1906, down to the first day of January, 1908, the defendant paid to the Omaha Elevator Company and the Trans-Mississippi Grain Company the elevation allowances provided in GFO No. 888 and GFO No. 904, where all the requirements and conditions of the said tariff had been complied with. The defendant alleges that said payments of said allowances were made under
and by virtue of certain written contracts theretofore
306 entered into between the defendant and the said last named elevator companies. This defendant denies each and every other allegation in said 7th paragraph of the plaintiffs' petition contained."

It is agreed that the reply as filed shall stand as the reply to the answer as amended.

Mr. Rich: The defendant offers in evidence Defendant's Exhibit 1, being a contract or agreement made on the 7th day of February, 1899, between the Union Pacific Railroad Company and Frank H. Peavey, of Minneapolis, Minnesota.

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, but this objection does not go to the failure to properly authenticate the document.

The Court: This contract is one, I take it, which was entered into between Peavey and this company, agreeing to pay these elevation charges?

Mr. Rich: Yes sir, this is the contract on which all these allowances were based.

Mr. Smith: But that can be no justification, Your Honor, under the decision, if it works a discrimination against us.

The Court: The objection at present, will be sustained. You may renew your offer if you establish the fact, by other

testimony, that the only elevation charges paid to the Peaveys or the Omaha Elevator Company were upon Union Pacific cars. Otherwise I don't see that it could possibly make any difference.

307 Mr. Rich: Then on the theory suggested by the Court it would be good so far as Union Pacific cars are concerned?

The Court: I don't know about that. If you didn't adhere to the contract and limit it to Union Pacific cars, but paid it indiscriminately on all cars, whether Union Pacific or not. I don't think we could separate out now those which—assuming it might have been legal because of the contract.

Mr. Rich: It has no reference to cars at all—any and all cars.

The Court: The objection may be sustained.

Mr. Rich: I want to withdraw the offer at this time.

308 Charles J. Lane, is here called and sworn as a witness on the part of the defendant. Being examined in chief by Mr. Edson Rich he testified as follows:

Q. What is your full name? A. Charles J. Lane.
Q. What is your business?
A. First Assistant General Freight Agent Union Pacific Railroad.
Q. How long have you held that position?
A. Ten years.
Q. Mr. Lane, you may examine Defendant's Exhibit 1, (the Peavey contract heretofore referred to) and state whether you have ever seen that exhibit before or not? A. Yes sir.

The Court: I do not understand the objection to go to the fact that it is not formally proven.

Mr. Smith: No, sir, Your Honor, I expressly waived that.

Mr. Rich: No sir, that is right, but I thought I would change the form of the offer a little.

Q. You may state whether or not that is one of the contracts between the Union Pacific Railroad Company and the Omaha Elevator Company on which the elevation charges that have been paid to the Omaha Elevator Company, as shown by the evidence, are based?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, calling for a conclusion of the witness.

The Court: I think the objection as calling for a conclusion of the witness is good. Show what the facts are and if there is any material difference it is for the jury to say whether it was paid under this contract or—

309 Q. Mr. Lane, you may state whether, prior to the 27th day of June, 1906, the Union Pacific Railroad Company paid elevator allowances to the Omaha Elevator Company of one and a quarter cents per bushel for grain unloaded out of Union Pacific cars at Council Bluffs, Iowa, at its elevator?

A. It paid one and a quarter cents per hundred.

Q. You may state whether or not these payments were based upon an oral or a written agreement, or any agreement at all?

Mr. Smith: Provided he knows.

Q. (Cont.) Provided you know.

A. The claims I handled were based on that contract.

Mr. Smith: I move to strike the answer out as not responsive.

The Court: Yes, it is not just exactly in response to the question.

Q. You may state whether or not they were based upon a written contract?

Mr. Smith: That is objected to as calling for a conclusion of the witness and as being irrelevant, incompetent and immaterial.

The Court: Yes, show all the facts.

Mr. Rich: Well, of course if Mr. Smith objects I think that is correct. It simply saves time that is all.

Q. Mr. Lane, you may state what your duties were as First Assistant General Freight Agent of the Union Pacific?

A. Well, they were varied and many as to general traffic matters.

Q. Were there any particular matters, or are there any particular matters under your immediate or direct control?

A. The vouchering of claims and the handling of general traffic matters.

310 Q. You may state whether or not the Omaha Elevator Company made claims against the Union Pacific Railroad, prior to June 27th 1906, on a basis of one and a quarter cents per hundred pounds for grain unloaded at its elevator at Council Bluffs, Iowa, from cars coming in over the Union Pacific Railroad?

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, calling for a period prior to the time in controversy in this case, and not the best evidence.

The Court: I don't see how it is material or can shed any light on this transaction.

Mr. Rich: It was simply leading up to the identification of the contract.

The Court: Well, you may identify this contract in a speedy way by leading questions, if you want to. If that is the purpose of it let's get this contract identified.

Mr. Smith: I waived the identification of it; I have not asked them to do that.

The Court: And you may do the same thing with regard to the assignment of the contract, if you have one, from the Peavey Company to the Omaha Elevator Company, so as to get right down to the merits of it.

Mr. Rich: We would have to call a witness to prove that assignment; it is recited in a supplemental contract.

Mr. Smith: You haven't the assignment here?

Mr. Rich: No, because we would have nothing to do with that; the assignment is from Peavey to the Omaha Elevator Company.

The Court: Oh, admit the assignment of it.
Mr. Smith: Well, go on, we will admit it.

311 The Court: Unless you are certain that they cannot prove it.

Mr. Smith: No, I don't doubt but what they can prove it.

Mr. Rich: Then I will simply renew that offer: The defendant now offers in evidence defendant's exhibit 1, being a contract executed on the 7th day of February, 1899, between the Union Pacific Railroad Company and Frank H. Peavey of Minneapolis, Minnesota.

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, but this objection does not go to the failure to properly authenticate or identify the signatures.

The Court: I think the objection to it should be sustained. So that you can get a proper record, though, I will say it is sustained on the ground—perhaps to have your record complete, the assignment, or agreement that it was assigned, should go in with it, so as to make it applicable, and then the objec-

tion will be sustained on the ground that it is wholly incompetent, irrelevant and immaterial.

Mr. Rich: (To Mr. Smith) Before you make your objection let me make a further offer—strike out that objection.

Mr. Smith: All right strike it out.

Mr. Rich: Defendant offers, in connection with Defendant's Exhibit 1, Defendant's Exhibit 2, being a contract supplemental to Defendant's Exhibit 1, entered into on the 9th day of July, 1906, by and betwen the Union Pacific Railroad Company and the Omaha Elevator Company.

312 The Court: Now let me see that one.

Mr. Smith: I object to these exhibits—

Mr. Rich: Now, just one moment, Mr. Smith, before you make your objection.

Mr. Smith: All right.

The Court: Let me see what is in this. (Defendant's Exhibit 2 handed to the Court). I am inclined to admit this one (Referring to Defendant's Exhibit 2) and if we do that the other one may go in with it.

Mr. Rich: It being stipulated and agreed that at a time prior to the date of Defendant's Exhibit 2, Defendant's Exhibit 1 had been assigned by Peavey to the Omaha Elevator Company.

Mr. Smith: Now, Mr. Rich, I have no knowledge of that at all, but if you state here professionally that that is the case, and that you can get the proof of it, I will accept your statement as being true.

Mr. Rich: I think there is no question about it; it is recited in the second contract.

The Court: Well, I will let them go in.

To which ruling of the court the plaintiffs except.

The Court: The only materiality that I can possibly see—the only place that I can see where these exhibits would be admissible, is perhaps, for the purpose of showing the construction, in that last one, of the term "forty eight hours", if that should be found to be material. For that purpose I am inclined to admit them.

313 Mr. Smith: Your Honor has not failed to observe that this supplemental agreement was made after the

publication of this tariff, and after the Interstate Commerce Law had been amended?

The Court: Sir?

Mr. Smith: After the tariff 888 was published and after the Interstate Commerce Law was amended?

The Court: Yes, but I think it defines, as between these parties at least, that forty-eight hour clause.

Mr. Smith: That may be, but that would not have any effect upon us.

The Court: I think you would be entitled to the same liberal provision. I don't regard it as an excuse, in my judgment, to discriminate, that it was in writing, or under this contract, but I am not certain but what the contract is admissible, not perhaps by them necessarily, but it is admissible, perhaps, as interpretation, and I will allow it on that ground —as an interpretation of when the forty-eight hours commenced to run and when it terminated. It is specifically stated in there when the forty eight hour period shall be understood to commence to run. The objection to the exhibits may be overruled and they may be received in evidence.

To which ruling of the Court the plaintiffs except.

Witness excused.

314 (Defendant's Exhibits 1 and 2 are read to the Court and jury by Mr. Rich).

A copy of Defendant's exhibit 1 is hereto attached and made a part of this record.

A copy of Defendant's Exhibit 2 is hereto attached and made a part of this record.

Mr. Rich: The defendant now offers in evidence, Defendant's Exhibit 3, being a contract between the Union Pacific Railroad Company and the Trans-Mississippi Grain Company, dated the first day of August, 1905, together with a supplemental contract thereto, being Defendant's Exhibit 4, dated the 8th day of March, 1906, and being between the same parties.

Mr. Smith: The plaintiffs object to these, and each of them, as being incompetent, irrelevant and immaterial.

The Court: These are similar contracts?

Mr. Rich: They are to the same effect, Your Honor.

The Court: The ruling will be the same as upon the others. The objection may be overruled and they may be received.

To which ruling of the Court the plaintiffs, and each of them, separately for themselves except.

Defendant's Exhibits 3 and 4 are read to the Court and jury by Mr. Rich.

A copy of Defendant's Exhibit 3 is hereto attached and made a part of this record.

A copy of Defendant's Exhibit 4 is hereto attached and made a part of this record.

315 Mr. Rich: The defendant now offers in evidence Defendant's Exhibit 5, being pages 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326 of Vol X of the Interstate Commerce Reports, as reported by the Commission and entered according to Act of Congress, in the year 1905 by the Lawyers Co-operative Publishing Company in the office of the Librarian of Congress, at Washington, D. C., bearing the impression: "The Lawyer's Co-operative Publishing Company, Rochester, N. Y. 1905", and being the opinion in case No. 687, "In the Matter of Allowances to Elevators by the Union Pacific Railroad Company".

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial and no proper foundation having been laid.

The Court: The objection is sustained as incompetent and immaterial.

Mr. Rich: On what ground, if Your Honor please?

The Court: I think all the grounds are good, but it is sustained as being incompetent and immaterial; I don't see that it sheds and light on this case.

Mr. Rich: Does that objection go to the authority of the publication of the record?

The Court: Yes, that is a part of the objection, and that is well taken, although I might admit them and overrule that part of the objection if the offer was good on other grounds; but if you had a certified copy of the decision from the Department, I should sustain the objection on the ground
316 that it is incompetent and immaterial—or immaterial. That one which you offer is the one which relates to the validity of the Peavey contract which you offered in evidence?

Mr. Rich: Yes. There is no imprint with reference to this being printed by the authority of the commission, that is true, and I suppose the objection on that ground is good, however, I renew my offer.

Mr. Smith: I am willing you should offer any of these opinions you want to, if I am permitted to offer any other things they have written on that same subject.

The Court: Well, if they are for the purpose of introducing evidence of what the opinion of the Commission was, as to the legal rights of parties, I think that we will take our chances of guessing on that without their views being given in evidence. If it is for the purpose of establishing a finding of fact, as contra-distinguished from law, I don't think it would be admissible unless these complainants were in some way connected as parties to that case, which I don't understand to be the fact.

Mr. Rich: It is possible that their findings of fact and conclusions of fact might be admissible.

The Court: They might be admissible if these complainants were connected with the case. Were these complainants connected with that case?

317 Mr. Smith: Oh, no. The Court of Appeals has expressly held that even in this proceeding I could not offer any evidence or opinion of the Commission in this case, and therefore, in beginning the case, I had to limit my offer, much to my regret.

The Court: No, we will take the chances of determining what the law is.

To which ruling of the court the defendant excepted.

Mr. Rich: I will complete that offer, although I think the objection is good myself, on one proposition.

The defendant now offers in evidence Defendant's Exhibit 6, being page 86 and the ten consecutive pages following, as found in Interstate Commerce Reports, Vol. 12, as reported by the Commission and published by the Lawyer's Co-operative Publishing Company of Rochester, New York, entered according to Act of Congress in the year 1908, by the Lawyers Co-operative Publishing Company in the office of the Librarian of Congress at Washington, D. C., said pages containing the opinion of the Interstate Commerce Commission of date April 9, 1907, in case No. 687, "In the Matter of Allowances to Elevators by the Union Pacific Railroad Company".

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation laid.

Objection sustained. Defendant excepts.

318 Mr. Rich: The defendant now offers in evidence Defendant's Exhibit 7, being pages 315 and 316 of Vol. 14. of the Reports of the Interstate Commerce Commission, as reported by the Commission, published at Washington by the Government Printing Office in 1909, being the opinion of the Interstate Commerce Commission on a rehearing in Case No. 687, "In the Matter of Allowances to Elevators by the Union Pacific Railroad Company", decided June 29, 1908.

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial, and no proper foundation laid.

Objection sustained. Defendant excepts.

Mr. Rich: The defendant now offers in evidence Defendant's Exhibit 8, being pages 317 to 332, both inclusive of Vol. 14 of the Interstate Commerce Reports, published by the Government at the Government Printing Office at Washington in the year 1909, as reported by the Commission, said pages containing an opinion by the Interstate Commerce Commission in Case No. 1239, Traffic Bureau, Merchants' Exchange of St. Louis v. Chicago, Burlington & Quincy Railroad Company, Cases. Nos. 1240, 1241, 1263 and 1267 being consolidated on said hearing, and said case having been decided on the 29th day of June, 1908.

Mr. Smith: That is objected to as incompetent, irrelevant and immaterial.

Objection sustained; Defendant excepts.

Defendant Rests.

319 Mr. Smith: The Plaintiff, The Updike Grain Company moves the Court to direct the jury to return a verdict in its favor for the amount found due it by the Interstate Commerce Commission, together with interest up to the first day of May, 1909, said amount being $7416.31.

The plaintiff, Nebraska-Iowa Grain Company, moves the Court to direct the jury to return a verdict in its favor for the amount found due it by the Interstate Commerce Commission, together with interest as provided by said order up to the first day of May 1909, in the sum of $2760.71.

Plaintiff, Crowell Lumber and Grain Company moves the Court to direct the Jury to return a verdict in its favor for the amount found due it by the Interstate Commerce Commis-

sion, together with interest as provided in said order up to the first day of May, 1909, in the sum of $754.15.

Mr. Rich: The defendant moves the Court to instruct the jury to return a separate verdict in favor of the defendant and against each and all of the plaintiffs in the above entitled case, for the following reasons, to-wit:

1st: For the reason that the petition does not state a cause of action, and states no sufficient cause of action upon which a verdict might be predicated.

2nd: For the reason that the proof offered by the plaintiffs fails to sustain the material allegations of the plaintiffs' Petition.

Motion overruled. Defendant excepts.

320 Mr. Rich: The defendant moves the Court to instruct the jury to return a verdict in favor of the defendant and against Nebraska-Iowa Grain Company, plaintiff in the above entitled case, for the following reasons, to-wit:

1st: For the reason that the petition does not state a cause of action, and states no sufficient cause of action upon which a verdict might be predicated.

2nd: For the reason that the proof offered by the plaintiff fails to support the material allegations of the plaintiff's Petition.

Motion overruled. Defendant excepts.

321 Mr. Rich: The defendant moves the Court to instruct the jury to return a verdict in favor of the defendant and against Crowell Lumber & Grain Company, plaintiff in the above entitled case, for the following reasons, to-wit:

1st: For the reason that the petition does not state a cause of action, and states no sufficient cause of action upon which a verdict might be predicated.

2nd: For the reason that the proof offered by the plaintiff fails to support the material allegations of the plaintiff's Petition.

Motion overruled. Defendant excepts.

322 Mr. Rich: The defendant moves the Court to instruct the jury to return a verdict in favor of the defendant and against The Updike Grain Company, plaintiff in the above entitled case, for the following reasons, to-wit:

1st: For the reason that the petition does not state a cause of action, and states no sufficient cause of action upon which a verdict might be predicated.

2nd: For the reason that the proof offered by the plaintiff fails to support the material allegations of the plaintiff's Petition.

Motion overruled. Defendant excepts.

Mr. Rich: The defendant moves the Court for a peremptory instruction to the jury to return a verdict in favor of the Union Pacific Railroad Company and against the plaintiff, Nebraska-Iowa Grain Company, upon that class of claims based upon cars unloaded and which were returned to the Union Pacific after the expiration of forty-eight hours.

Motion overruled. Defendant excepts.

323 Mr. Rich: The defendant moves the Court for a peremtory instruction to the jury to return a verdict in favor of the Union Pacific Railroad Company and against the plaintiff, Crowell Lumber and Grain Company, upon that class of claims based upon cars unloaded and which [—] returned to the Union Pacific after the expiratiion of forty-eight hours.

Motion overruled. Defendant excepts.

Mr. Rich: The defendant moves the Court for a peremptory instruction to the jury to return a verdict in favor of the Union Pacific Railroad Company and against the plaintiff, The Updike Grain Company, upon that class of claims based upon cars unloaded and which were returned to the Union Pacific after the expiration of forty eight hours.

Motion overruled. Defendant excepts.

324 The Court: (Referring to the Report and Order of the Interstate Commerce Commission in cases Nos. 1628, Nebraska-Iowa Grain Company v. Union Pacific Railroad Company; 1642, Crowell Lumber and Grain Company v. Union Pacific Railroad Company; 1655, The Updike Grain Co., v. Union Pacific Railroad Co.; 1644, Cavers Elevator Co. v. Union Pacific Railroad Co.; 1775, Nye-Schneider-Fowler Grain Co. v. Union Pacific Railroad Co.) Here is a finding of fact by the Commission "that the complainant in Case No. 1628, Nebraska-Iowa Grain Company v. Union Pacific Railroad Company, between July 2, 1906, and July 22nd, 1907, unloaded at its elevator 183 carloads of grain, containing in the aggregate 12,104,900 pounds, where the cars were returned to the Union Pacific within forty-eight hours; that upon 11,898,260 pounds of this amount the tariff allowance at the

time was 1¼ cents per 100 pounds, or $1,487.28; that upon 206,640 pounds the allowance was at the time of its unloading ¾ cent per 100 pounds, or $15.50, making a total of $1,502.78".

Now that is upon cars which were returned to the Union Pacific, which they find as a fact, within 48 hours. As at present advised in the case of Nebraska-Iowa Grain Company I shall direct the jury to find for the plaintiff in that amount.

Now, then, they further say: "That the said complainant, between the said dates unloaded fourteen cars which belonged either to the road performing the switch service or to a direct connection within the switching territory, and which were returned to the owner and never returned to the Union Pacific; that such cars contained in the aggregate 877,820 pounds of grain, and that the elevation allowance of 1¼ cents
325 per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $109.73."

As at present advised I shall direct the jury to find for the plaintiff for that sum in this case, for the reason that it was impractical and impossible, under the agreement which the Union Pacific had made with other railroads—this railway association agreement—for those cars to be returned. For instance, a Burlington car or a Rock Island car comes in with grain over the Union Pacific, it is set to the elevator of the Nebraska-Iowa Grain Company, which is on the Burlington road. Now under the agreement which the Union Pacific have entered into with other railroads they have made it impossible for the Nebraska-Iowa Grain Company to deliver that car back to the Union Pacific, because the Union Pacific has entered into an agreement with other railroads that the switching road, instead of delivering the car back to the company that delivered it there, say it shall be delivered back to the owner, if the owner is one of the roads which has connection. So that the provision that they be returned to the Union Pacific within forty-eight hours would be void, or would be inoperative I will say, at least as to those cars which they have agreed among the railroads and switching companies shall not be delivered back to the Union Pacific but shall be delivered to the owner road. Now, then, that is very clear to my mind that your forty eight hour provision cannot apply where, by a contract with the switching roads, you have made it impossible for the grain company to comply with it.

326 Now then it further says: "That said complainant between said dates unloaded 110 cars belonging to foreign roads or to the Union Pacific", I don't know why they have made this finding in that way in connection with the follow-

ing finding, which we shall see later—"belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific Company more than forty eight hours from the time they were received from that company; that the contents of these cars aggregated 7,722,040 pounds; that upon 6,961,500 pounds of this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $870.19; that upon 360,540 pounds the allowance at the time of its unloading was ¾ cent per 100 pounds, or $27.04, making a total of $897.23.

Now these cars which they say belonged to foreign roads or the Union Pacific which were returned to the Union Pacific, but not until after the period of forty eight hours had expired—that those cars, however, did belong to the Union Pacific I think follows from the very next finding, which reads: "That the said complainant did not unload any cars belonging to foreign roads having no direct connection within the switching territory". So that qualifies, necessarily, the phrase, "Foreign roads or Union Pacific".

Now as to that provision, as to that amount, I am ready to hear you gentlemen discuss as to what I shall do with that amount, whether or not the Court shall direct a verdict one way or the other as to that amount, or whether there is a question of fact in that which should go to the jury, as to the reasonableness, under the evidence, of that 48 hour pro-
327 vision; as to whether or not it is a discrimination to say to one shipper, who happens to get Union Pacific cars that are delivered to him—as we know, or as we take judicial notice of, that the railroad company delivers cars to the shipper where the grain originates at his request, and delivers such cars as are most convenient for them to deliver, whether they are some of their own cars or whether they are cars of some other road—Now here are two shippers say, at Columbus, for instance—you have used that station several times during the trial of the case as an illustration—say there are two shippers there who are competitors, supposing the Union Pacific delivers to one of those shippers all Union Pacific cars, and to the other shipper cars that belong to some other road and which, under the agreement of the railroad association do not have to be and cannot be returned to the Union Pacific but should go back to the other road to which they belong, and upon which there is no 48 hour or any other limit. They may furnish one shipper all Union Pacific cars and may furnish to his competitor cars of other roads. He don't have to turn his back to the Union Pacific, because, under that agreement, the other roads that they belong to take them. The fellow that has the Union Pacific cars must turn

his back within forty-eight hours in order to get the allowance. I think that that is an improper discrimination. However, I will hear you gentlemen on that proposition.

Now, the same applies exactly as to the Crowell Lumber and Grain Company findings; the same with the exception of amounts, of course, and in that finding they say: "That the said complainant did not unload any cars belonging to
328 foreign roads having no direct connection within the switching territory", which has the effect of eliminating the words: "foreign cars or Union Pacific" out of that.

Now the Updike Grain Company is the same with the exception that it does not have that provision, that they do not have foreign cars. So we have this provision, after the other provisions as to cars returned in 48 hours, and cars belonging to roads having connection which were not returned at all but were returned to the owning road, we have this finding: "That the said complainant between said dates unloaded 54 cars belonging to foreign roads, or to the Union Pacific, which were returned to the Union Pacific Company more than forty-eight hours from the time they were received from that company"—you see they were returned back to the Union Pacific, were not loaded and sent east, but were returned back to the Union Paicfic—" the contents of these cars aggregated 3,456,230 pounds, of grain and the elevation allowance, according to the tariff rates at the time of the unloading at 1¼ cents per 100 pounds, amounted to $432.02".

Now there is no finding here that there were no foreign cars, so in that case there were foreign cars, that is, cars of roads which had no connection with the switching connections here in Omaha, Baltimore & Ohio, Pennsylvania, New York Central or something of that kind. They were returned to the Union Pacific but were returned more than forty-eight hours afterwards. They do not come under that provision here, under Rule 2 of A or B, as being loaded and sent out towards their home; but were returned to the Union Pacific. Now I am inclined to think that under this testimony that the forty-eight hour provision for returning cars is not an un-
329 reasonable one, so I don't see any question of fact, really, to go to the jury, myself, unless you gentlemen convince me to the contrary.

But the question which is open yet in my mind is as to whether, treating them as Union Pacific cars, whether it might not be an unlawful discrimination to undertake to say to a shipper, notwithstanding we furnish you cars, whether they are ours or belong to some other road which are convenient,

we will furnish the cars promiscuously to you as we happen to have them—which I think is such a general custom that the Court is warranted in taking judicial notice of that fact—and say to the fellow that we furnish them, but if we furnish Union Pacific cars you must unload them and get them back to us in 48 hours; then say to the party to whom they furnish a Burlington car or a Rock Island car, or a Northwestern car, or a Missouri Pacific car, or cars of any road having a switching connection here—the effect of the two provisions is to say to them; "You don't have to return the car to us at all". As between the complainants and those other roads they might keep them for 48 days and not return them for 48 days, and it is no affair of the Union Pacific because the Union Pacific is not entitled to have them come back to themselves, but have said to the switching road "They are to go to the owner". Now does that make an unjust discrimination so that this whole provision about the forty-eight hours must fall? I will hear you gentlemen on that, as to whether that is right or wrong. I am pretty clear that is shows a discrimination, and I shall direct, as to the other provisions, that a verdict shall be found for the plaintiffs as to those respective amounts. But I will hear what you gentlemen have to say upon this last proposition.

330 After hearing the arguments of counsel upon the proposition as indicated above, the court instructed the jury as follows:

Gentlemen of the Jury: I think I will cut this matter short and say to you, Gentlemen of the Jury, that the Court will relieve you of responsibility in the matter so that you need not have any compunction of conscience, and I will direct you to find a verdict for the Nebraska-Iowa Grain Company in the sum of $2509.74, with interest from July 22nd, 1907; and in the case of the Crowell Lumber and Grain Company, that you find a verdict in their favor in the sum of $698.29, with interest from December 26th, 1907, and in the case of the Updike Grain Company that you find a verdict in their favor for the sum of $6742.10, with interest from July 1st, 1907.

To which instruction of the Court, the defendant Union Pacific Railroad Company, in the presence of the Jury, and before the rendition of the verdict, expected.

Defendant Union Pacific Railroad Company, at the time of the giving of the Court's instruction, in the presence of the Jury, and before the rendition of the Verdict, excepts to that

portion of the instruction of the Court, in the following language: "I will direct you to find a verdict for the Nebraska-Iowa Grain Company, in the sum of $2509.74, with interest from July 22nd, 1907".

Defendant Union Pacific Railroad Company, at the time of the giving of the Court's instruction, in the presence of the Jury, and before the rendition of the verdict, excepts to that portion of the instruction of the court, in the following language: "I will direct you * * * * in the case of
331 Crowell Lumber and Grain Company that you find a verdict in their favor in the sum of $698.29, with interest from December 26th, 1907".

Defendant Union Pacific Railroad Company, at the time of the giving of the Court's instruction, in the presence of the Jury, and before the rendition of the Verdict, excepts to that portion of the instruction of the Court, in the following language: "I will direct you * * * * in the case of the Updike Grain Company, that you find a verdict in their favor, for the sum of $6742.10, with interest from July 1st, 1907."

332 Defendant's Exhibit 1.

This Agreement made this 7th day of Feby, 1899 between Union Pacific Railroad Company, a corporation organized and existing under the laws of the State of Utah and hereinafter called the Railroad Company, party of the first part, and Frank H. Peavey, of Minneapolis, Minnesota, party of the second part,

Witnesseth, that

Whereas, Railroad Company is the owner of a line of railroad extending from Council Bluffs, Iowa, to various points in Nebraska, Kansas, Colorado, Wyoming and Utah; and

Whereas, large quantities of grain are grown along the line of said railroad and shipped over the same and marketed at points beyond the eastern terminus of said railroad at Council Bluffs, Iowa; and

Whereas, it is desirable and advantageous to the Railroad Company that all grain destined for points beyond its terminus shall be transferred and unloaded at Council Bluffs, Iowa, so that the cars in which said shipments are made shall be promptly released and remain upon its own line of railroad, subject to immediate and constant use; and

Whereas, the party of the second part is willing to erect an elevator at Council Bluffs, Iowa, as hereinafter mentioned.

Now Therefore, in consideration of the agreement upon the part of each, to be kept, done and performed, and in consideration of the sum of One Dollar to each in hand paid, the receipt whereof is hereby acknowledged, the parties hereto enter into the covenants and agreements following:

333 Article I.

First: Railroad Company will convey to Frank H. Peavey upon demand for the sum of Fifty Dollars ($50.00) by a good and sufficient deed of warranty, subject, however, to the conditions and limitations below expressed, the following described real estate situated in the City of Council Bluffs, County of Pottawattamie, State of Iowa, to-wit:

Commencing at the northeast corner of section three (3) in township seventy-four (74) north of range forty-four (44) west of the 5th Principal Meridian; thence south along the east line of section three (3), 672.9 feet to the point of intersection of said easterly line with the center line of the easterly or main track to the Peavey Elevator, thence southeasterly along said center line of Elevator main track, 693.4 feet to a point 45 feet northwesterly from the northwesterly line of the Peavey Elevator, when measured at right angles thereto; being the point of beginning of land leased. Running thence northeasterly at right angles to said center line of Elevator main track 30 feet; thence southeasterly parallel with and 30 feet distant from the center line of said elevator track 300 feet; thence southwesterly at right angles to center line of elevator main track 300 feet; thence northwesterly parallel with and 270 feet distant from center line of elevator main track 300 feet; thence at right angles northeasterly 270 feet to point of beginning, as shown on attached blue print—

Containing an area of 90,000 square feet of land, more of less.

Second. It also agrees to convey by a like deed to said second party, subject to like conditions and limitations,
334 from time to time, such additional land adjoining the above described land, as may be required by said second party for any additions to said elevator building.

Third: Said deeds or conveyances are subject to the following conditions: That in case the elevator building to be erected upon said premises by said Peavey or his assigns shall be in any manner injured or destroyed, and shall not be rebuilt or repaired and put in as good condition as before such injury or destruction, within eighteen months from the date of such injury or destruction, or, if said Peavey or his suc-

cessors shall fail or neglect, for any cause, to operate, said elevator for a period of five years, then said real estate shall revert to and become reinvested in said Railroad Company as in its first and former estate. Provided that thereupon the said Peavey, or his assigns, may remove from said real estate, the said elevator buildings or other improvements made thereon by him or them, at any time within six months from the time said Railroad Company may, in writing, notify the said Peavey or his successors to remove the same therefrom.

Fourth: Railroad Company will provide on said real estate for the use of said elevator, on or before the first day of June, 1899, and will maintain, and if it so elects, exclusively operate, during the time said elevator is operated according to this contract, yard room and a system of side tracks and switches, according to the plans thereof on the map hereto attached and made a part hereof.

Fifth: Railroad Company will deliver to said Elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said elevator, and will pay to Frank H. Peavey, or his assigns, on all such grain
335 transferred through said Elevator a transfer not exceeding one and one-quarter cents per hundred pounds during the first ten years of this contract, and not exceeding one cent per hundred pounds thereafter, but at no time shall the transfer charge herein provided to be paid exceed such transfer charge as is customarily made upon similar business at similar points.

Such payments to be made on the 20th day of the month succeeding month in which the transfer service is performed.

Sixth: Railroad Company agrees to provide said Peavey for said elevator, equal privileges and advantages as it may grant to the proprietors of any other grain elevator or elevators that are now, or which may hereafter be, located on or served by said Railroad Company at Omaha, Nebraska, or Council Bluffs, Iowa, and that all cars coming from or going to any point or points on said railroad, to or from the said elevator, and not less than ten miles from Omaha, shall be switched, whether loaded or empty, to or from said elevator, free of charge.

Seventh: Railroad Company will receive from and deliver to connecting lines of railroad at Council Bluffs, cars for loading, unloading or transfer of grain at said elevator, as cheaply as charged by it for handling cars for loading, unloading or transfer to any other elevator at Omaha or Council

Bluffs, and not exceeding in the aggregate such sum in any one year as will equal five per cent per annum upon the amount invested by railroad company in said yards, tracks and switches, including the lands upon which the same are located, and in addition thereto the cost of such switching service, including therein the amount of taxes and assessments
336 paid on its said grounds, yards, switches, side tracks and appurtenances. Such total cost to be apportioned between the several lines for which such services are rendered, according to wheelage, and upon the wheelage basis hereinafter defined.

Eighth: It will permit other lines of railroad connecting with its railroad at Council Bluffs, Iowa, to use said tracks, side tracks, switches and appurtenances for access to said elevator, upon such other companies severally entering into a satisfactory contract with said Railroad Company, providing that the use of said tracks, side tracks, switches and appurtenances shall be compensated for by the payment of an equal part of an interest charge upon the value of said property and of the ground of the Railroad Company on which the same are constructed, at the rate of five (5) per cent per annum, payable in equal monthly installments, and also by the payment to said Union Pacific Railroad Company of a wheelage proportion, as hereinafter defined, of the cost of maintenance, repairs and operation of said tracks, switches and side tracks and appurtenances, including taxes and assessments laid and paid thereon, which proportion of aggregate monthly payments for such purposes shall be as the number of cars handled thereon during any month by such connecting or other railroad company over said tracks, side tracks, switches or appurtenances, or any part thereof, shall be to the whole number of cars or engines handled over the same tracks during the same period; and further agreeing to submit to the rules and regulations respecting the operation and conduct of switching service and car service upon said tracks as said Railroad Company may pre-
337 scribe; and also providing that such company or companies so admitted to the use of such tracks and premises, pay all damages to persons or property directly or indirectly caused by its engines, cars, agents or servants while in or upon said premises.

Article II.

First: In consideration whereof, the said party of the second part hereby agrees to erect and complete on said premises, ready for operation, on or before the first day of June, 1899, a first class elevator, equipped with modern appliances, and

thereafter maintain in a like condition a grain elevator of the capacity of about one million five hundred thousand, (1,500,000) bushels of grain.

Second: When said elevator is in operation, to receive from said Railroad Company any grain tendered by it, which originates on the lines of said Railroad Company, and which may be consigned to or in care of said elevator to the capacity thereof, and to promptly transfer said grain from said Railroad Company's cars through said elevator, so that such business tendered to said elevator by said Railroad Company shall be first transferred and the cars of said Railroad Company promptly released.

Third: Second party agrees that in case said elevator shall be injured or destroyed, so that the same cannot be operated, and that if the same shall not, within eighteen months thereafter, be rebuilt or repaired in such a manner as to render it substantially in as good condition as before such injury or destruction, then the land above mentioned is to revert to and become invested in the party of the first part.

338 Fourth: Second party further agrees that in case he shall fail or neglect, for any cause, to operate said elevator in accordance with the terms of this contract, for a period of five years, then said real estate above described shall revert to and become reinvested in said Railroad Company as in its first and former estate.

Fifth: Railroad Company shall not be held or charged for any loss or damage to said elevator building, or for loss or damage to any grain or other property therein, which may occur or happen by or through the escape or communication of fire from the locomotives of said Railroad Company, or the locomotives of any company admitted to use said yards, tracks, side tracks and appurtenances, while such locomotives are engaged in operating upon said tracks and switches provided by said Railroad Company under the terms of this agreement.

Sixth: When said elevator is in operation, and to the then capacity thereof, that he will at all times when hereafter requested or required by said Railroad Company, receive and safely store in said elevator for forty-eight (48) hours, free of charge, any grain which may be delivered from said Railroad Company's tracks, originating on the lines of said Railroad Company, and delivered from its tracks at said elevator building for storage or transfer.

Article III.

First: It is mutually understood and agreed between the parties hereto that all of the provisions of this contract shall

be binding upon the successors and assigns of the parties hereto.

Second: It is further agreed that if any corporation now existing, or which shall hereafter be formed and author-
339 ized to own and operate said elevator, and the said elevator and lands above described, shall be conveyed to it, and this contract assigned to the same person or corporation, then, upon the assumption by said person or corporation of all the obligations of this contract, and consent to the reservations and conditions of said deed or deeds, the said Peavey shall be discharged from any and all further responsibility hereunder.

Article IV.

If at any time a difference of opinion shall arise in respect to the rights or duties of either party under this agreement, or under the rules which may be adopted by the parties hereto, the question in dispute shall be referred to a Board of Arbitrators, consisting of three competent disinterested persons, one of whom shall be chosen by each party to the dispute, and the two so chosen shall select a third. The party desiring such arbitration shall give written notice of the same to the other party, setting forth therein definitely the point in dispute, and shall name the person selected by such party to act as arbitrator. If any party served with such notice shall not, within fifteen days after such service, name a second disinterested person to act as arbitrator, the party serving such notice may select the second, and the two thus chosen shall select a third. The Board of Arbitrators thus chosen shall proceed at once to hear, consider and determine the matter submitted to them, and shall give to each of the parties to such matter of difference, notice, which shall not be less than ten days, of the time and place of hearing, and at the time and place appointed, shall proceed with the hearing, unless for good cause, of which the arbitrators shall be the judges, it shall be
340 postponed to some later day. And the determination of the Board of Arbitrators thus constituted, or of a majority of the persons composing the same, to be made in writing, and a copy thereof to be delivered to each of the parties, shall be final and conclusive upon the parties in reference to all matters thus submitted. The above provisions respecting arbitration shall not be the sole remedy of the parties hereto, but any party may resort to any other legal remedy. The existence of a controversy as to the construction or validity of any covenant or agreement herein shall not delay or affect the performance of any other covenant or agreement. The Arbitrators herein provided for may, in their final judgment, apportion the cost or expense of arbitration between the parties to

the controversy or award the payment of such costs and expenses as may seem to them just. Pending the decision of arbitrators, the business, settlements, or payments affected by such controversy shall be transacted and made in the manner and form existing prior to the raising of such questions by any party claiming relief.

In Testimony Whereof, the parties hereto have caused these presents to be duly executed.

UNION PACIFIC RAILROAD COMPANY,
By (Sgd) By Horace G. Burt, President.
Attest: (Sgd) Alex. Millar, Secretary,
(Sgd). FRANK H. PEAVEY.

Witness:
(Sgd) H. G. Dickey,
(Sgd) W. C. Miller,

341 Defendant's Exhibit 2.

Supplemental Agreement.

This Supplemental Agreement, made this 9th day of July, 1906, by and between Union Pacific Railroad Company, a corporation organized and existing under the laws of the State of Utah and hereinafter called the Railroad Company, party of the first part, and the Omaha Elevator Company, a corporation organized and existing under the laws of the State of Nebraska, and hereinafter called the Elevator Company, party of the second part,

Witnesseth:

Whereas, an agreement has been entered into between the Railroad Company and one Frank H. Peavey of Minneapolis, Minnesota, on the 7th day of February, 1899, hereinafter called the Original Agreement; and,

Whereas, under the terms of Article III of said Original Agreement, the elevator and lands described therein have been conveyed to the said Elevator Company, and the said Original Agreement has been assigned to said Elevator Company by the said Peavey, and the said Elevator Company has assumed all the obligations of the said Peavey under said contract and has consented to the reservations and condition of the deeds therein described and referred to, and the said Elevator Company has succeeded in all respects to the rights and obligations of said Peavey under said Original Agreement; and

Whereas, as indicated in the preamble to said Original agreement, the purpose and object thereof was so that "all

grain destined for points beyond the terminus of said railroad at Council Bluffs, Iowa, shall be transferred and
342 unloaded at Council Bluffs, Iowa, so that the cars in which said shipments are made shall be promptly released and remain upon its own line of railroad, subject to immediate and constant use";

And Whereas, it is provided in the second section of Article II of said Agreement, as follows:

"Second: When said elevator is in operation (said Peavey agrees) to receive from said Railroad Company any grain tendered by it which originates on the lines of said Railroad Company and which may be consigned to or in care of said Elevator to the capacity thereof, and to promptly transfer such grain from said Railroad Company's cars through said elevator, so that such business tendered to said elevator by said Railroad Company shall be first transferred and the cars of said Railroad Company promptly released."

And Whereas, it is advisable and expedient that there should be an understanding and agreement as to the meaning of the words "promptly transfer" and "promptly released", as used in said section, and as to what shall constitute a prompt transfer of grain and prompt release of the Railroad Company's cars, so as to entitle the said Omaha Elevator Company to the allowance and payment of the transfer charge, as provided in said Original Agreement:

Now, Therefore, it is hereby understood and agreed between the parties hereto that a prompt transfer of grain through said elevator and a prompt release or return of the cars
343 of said Railroad Company carrying the said grain, within the meaning of the terms, as used in said Original Agreement, in order to entitle the said Omaha Elevator Company to such transfer charges specified in said Original Agreement, shall be and mean the transferring of the grain in any car placed at said elevator and the release and return of the empty car to said Railroad Company within forty eight hours of the time the loaded car is placed at said elevator, and it is understood and agreed that when any loaded car remains at said elevator for more than forty-eight hours before being emptied and released and returned to the railroad company it will not be considered a prompt transfer of the grain nor release of the car, within the meaning of the terms of said Original Agreement, and the said Omaha Elevator Company shall not be entitled to any transfer charges thereon.

In Testimony Whereof, the parties hereto have caused these presents to be duly executed.

UNION PACIFIC RAILROAD COMPANY,
(Sgd) By A. L. Mohler,
Vice President & General Manager.

OMAHA ELEVATOR COMPANY,
By (Sgd) E. P. Peck, V. Prest.

Dated July 9th, 1906.

344 Defendant's Exhibit 3.

This Agreement, Made and entered into this 1st day of August, 1905, by and between Union Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Utah (hereinafter for convenience called "Railroad Company") as party of the first part, and Trans-Mississippi Grain Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois (hereinafter for convenience called "Grain Company"), as party of the second part,

Witnesseth, that

Whereas, Railroad Company is the owner of a line of railroad extending from Council Bluffs, Iowa, to various points in Nebraska Kansas, Colorado, Wyoming and Utah; and

Whereas, large quantities of grain are grown along the line of said railroad and shipped over the same and marketed at points beyond the eastern terminus of said railroad at Council Bluffs, Iowa; and

Whereas, it is desirable and advantageous to the Railroad Company that all grain destined for points beyond its terminus may be transferred and unloaded at Council Bluffs, Iowa, so that the cars in which said shipments are made shall be promptly released and remain upon its own line of railroad, subject to immediate and constant use; and

Whereas, the party of the second part is willing to erect an elevator at Council Bluffs, Iowa, as hereinafter mentioned.

Now Therefore, in consideration of the agreements upon the part of each, to be kept, done, and performed, and in consideration of the sum of One Dollar ($1.00) to each in hand paid, the receipt whereof is hereby acknowledged, the parties hereto enter into the covenants and agreements following:

Article I.

345 I. The Railroad Company will lease and demise to said Grain Company, for the sum of Fifty Dollars

($50,00) for the term of twenty (20) years from the date hereof, subject, however to the conditions and limitations below expressed, the following described real estate situate in the City of Council Bluffs, County of Pottawattamie, State of Iowa, to-wit:

Commencing at the northeast corner of Section 3, in township seventy-four (74) north of range forty-four (44) west of the fifth principal meridian;

Thence south along the east line of Section three (3) 1131.6 feet to the point of intersection of said east section line with the center line of the easterly or main track to the Trans-Mississippi Grain Company's Elevator;

Thence northwesterly along said center line of elevator main track, 101.1 feet to a point 94.0 feet southeasterly from the southeasterly line of the Trans-Mississippi Grain Company's elevator, when measured at right angles thereto, being the point of beginning of the land conveyed;

Thence running northeasterly at right angles to said center line of elevator main track 35 feet;

Thence northwesterly parallel with and 35 feet distant from the center line of said elevator track 300 feet;

Thence southwesterly at right angles to center line of elevator main track 400 feet;

Thence southeasterly parallel with and 365 feet distant from center line of elevator main track 300 feet;

Thence at right angles northeasterly 365 feet to point of beginning, as shown on the plat marked "Exhibit A",
346 hereto attached and made a part of this agreement, containing an area of 120,000 square feet of land, more or less.

2. Said lease to be subject to the following conditions: That in case the elevator building hereinafter agreed to be erected upon said premises by said Grain Company, or its successors or assigns, shall not be completed within six (6) months from the date hereof, or if the same after its erection shall be in any manner injured or destroyed, and shall not be rebuilt or repaired, and put in as good condition as before such injury or destruction, within eighteen (18) months from the date of such injury or destruction, or if said Grain Company, or its successors or assigns shall fail or neglect, for any cause, to operate said elevator for a period of five years or if said Grain Company shall fail to comply with all of its covenants and agreements contained in its agreement with said Railroad

Company dated August 1, 1905, then said real estate shall revert to and become reinvested in said Railroad Company as in its first and former estate; Provided that thereupon the said Grain Company, or its successors or assigns, may remove from said real estate, the said elevator building or other improvements made thereon by it or them, at any time, within six months from the time said Railroad Company may, in writing, notify said Grain Company, or its successors or assigns, to remove the same therefrom.

3. Railroad Company will provide on said real estate for the use of said elevator, on or before the 1st day of January, 1906, and will maintain, and if it so elects, exclusively operate, during the time said elevator is operated according to this contract, yard room, and a system of side tracks
347 and switches, according to the plans thereof shown on the map hereto attached and made a part hereof, but said Railroad Company may, from time to time, change and modify the location of said tracks, as it may deem proper or necessary for the handling of the business herein provided for.

(See modification March 8, 1906)

4. Said Railroad Company will deliver to said elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said elevator, and until February 7th, 1909, will pay to said Grain Company, its successors or assigns, on all such grain transferred through said elevator, a transfer charge equal to the rate or rates from time to time and currently paid to the Omaha Elevator Company at Council Bluffs, Iowa, or any other elevator rendering like and similar transfer service to said Railroad Company, at either Omaha, Nebraska, or Council Bluffs, Iowa, but only when and while such transfer charges are paid by said Railroad Company to said Omaha Elevator at Council Bluffs, Iowa, or to any other elevator in Omaha, Nebraska, and if such payments are judicially determined to be unlawful, or if from any other cause, the payment of any such transfer charges to any such elevator is not made, or suspended, the obligation to pay the transfer charges under this agreement is for the corresponding period also suspended. Such compensation for the transfer service to be rendered by the Grain Company, at no time shall exceed the transfer charges customarily made upon similar business at the same or similar points. Such payments to be made upon the 20th day of the following month in which the transfer service is per-
348 formed, but no transfer charges will be made or imposed against Union Pacific Railroad Company on any grain whatever, switched to or handled through said elevator, which

is transported to Omaha or Council Bluffs by any other than Union Pacific Railroad Company.

5. The term of this contract is hereby limited to expire on the 1st day of August, 1925, and all rights hereby conferred will then utterly cease and determine.

6. Said Railroad Company agrees to provide said Grain Company for said elevator, equal privileges and advantages as it may grant to the proprietors of any other grain elevator or elevators that are now, or which may hereafter be located on or served by said Railroad Company, at Omaha, Nebraska, or Council Bluffs, Iowa, and that all cars coming from or going to any point on said railroad to or from said elevator and not less than ten miles from Omaha, shall be switched, whether loaded or empty, to and from said elevator free of charge.

Article II.

1. In consideration whereof the said Grain Company hereby agrees to erect and complete on said premises, ready for operation, on or before January 1st, 1906, a first class elevator, equipped with modern appliances, and thereafter maintain in a like condition, a grain elevator of the capacity of Six hundred thousand (600,000) bushels of grain, same to be enlarged from time to time as the demands require.

2. When said elevator is in operation, the Grain Company will receive from said Railroad Company, to the extent of the capacity of said elevator, any and all grain tendered by
349 said Railroad Company to said Grain Company, for transfer or storage as herein provided, which may originate on the lines of said Railroad Company, whether consigned to said Grain Company or not, and also all grain which may be consigned to said Grain Company, or to any one in care of said elevator, and to promptly transfer said grain from the cars of said Railroad Company through said elevator, so that such grain tendered by said elevator by said Railroad Company shall be first transferred and the cars of said Railroad Company promptly released.

3. Said Grain Company agrees that in case said elevator shall be injured or destroyed, so that the same cannot be operated, and if the same shall not, within eighteen months thereafter, be rebuilt or repaired in such manner as to render it substantially in as good condition as before such injury or destruction, then the land above mentioned is to revert to and become reinvested in the said Railroad Company.

4. Said Grain Company further agrees that in case it shall fail or neglect, for any cause, to operate said elevator in accordance with the terms of this contract, for a period of five years, then said real estate above mentioned and described shall revert to and become reinvested in said Railroad Company as in its first and former estate.

5. Said Railroad Company shall not be held or charged for any loss or damage to said elevator building, or for loss or damage to any grain or other property therein, which may occur or happen by or through the escape or communication of fire from the locomotives of said Railroad Company, or the
350 locomotives of any company admitted to use said yards, tracks, side tracks and appurtenances, while such locomotives are engaged in operating upon said tracks and switches provided by said Railroad Company under the terms of this agreement.

6. When said elevator is in operation, and to the capacity thereof, said Grain Company will at all times, when hereafter requested or required by said Railroad Company, receive and safely store in said elevator, for forty-eight (48) hours, free of charge, any grain which may be delivered from said Railroad Company's tracks, originating on the lines of said Railroad Company; and delivered from its tracks at said elevator building for storage or transfer.

Article III.

1. It is mutually understood and agreed by and between the parties hereto that all of the provisions of this contract shall be binding upon the successors and assigns of the parties hereto.

2. It is further agreed that if any corporation now existing or which shall hereafter be formed and authorized to own and operate said elevator, the leasehold interest in lands above described, shall be conveyed to it and if this contract shall be assigned to the same person or corporation, then, upon the assumption by said person or corporation of all the obligations of this contract, and consent to the terms of said lease, the said Grain Company shall be discharged from any and all further responsibility hereunder; Provided, such transfer, assignment and assumption shall be first approved by the Railroad Company in writing.

351 Defendant's Exhibit 3. (p. 8).

Article IV.

1. If at any time a difference of opinion shall arise in respect to the rights or duties of either party under this agree-

ment, or under the rules which may be adopted by the parties hereto, the question in dispute shall be referred to a Board of Arbitrators, consisting of three competent disinterested persons, one of whom shall be chosen by each party to the dispute, and the two so chosen shall select a third. The party desiring such arbitration shall give written notice of the same to the other party, setting forth therein definitely the point or points in dispute, and shall name the person selected by such party to act as arbitrator. If, however, any party served with such notice shall not, within fifteen days after such serivce, name a second disinterested person to act as arbitrator, the party serving such notice may select the second, and the two thus chosen shall select a third. The Board of Arbitrators thus chosen shall proceed at once to hear, consider and determine the matter submitted to them, and shall give to each of the parties to such matter of difference notice which shall not be less than ten days, of the time and place of hearing, and at the time and place appointed, shall proceed with the hearing, unless for good cause, of which the arbitrators shall be the judges, it shall be postponed to some later day. And the determination of the Board of Arbitrators thus constituted, or of a majority of the persons composing the same, to be made in writing, and a copy thereof to be delivered to each of the parties, shall be final and conclusive upon the parties in reference to
352 all matters thus submitted. The above provisions respecting arbitration shall not be the sole remedy of the parties hereto, but any party may resort to any other legal remedy. The existence of a controversy as to the construction or validity of any covenant or agreement herein shall not delay or affect the performance of any other covenant or agreement. The arbitrators herein provided for may, in their final judgment, apportion the cost or expense of arbitration between the parties to the controversy, or award the payment of such costs or expenses as may seem to them just. Pending the decision of the arbitrators, the business, settlements or payments affected by such controversy shall be transacted and be made in the manner and form existing prior to the raising of such questions by the party claiming relief.

In Testimony Whereof, the parties hereto have caused these presents to be duly executed by their respective officers thereunto duly authorized, attested by their re-

spective Secretaries with their respective seals attached, the day and date first above written.

UNION PACIFIC RAILROAD COMPANY,
Attest: By (Sgd) A. L. Mohler, Vice Pres't and
(Sgd) Jos. Hellen, Gen'l Manager.
Asst' Secretary.
(Seal)

TRANS-MISSISSIPPI GRAIN COMPANY.
Attest: By (Sgd) F. S. Cowgill, President.
(Sgd) S. E. Baker,
Ass't Secretary.
(Seal)

353 Defendant's Exhibit 4.

Supplemental Agreement.

This Supplemental Agreement, made this 8th day of March, 1906, by and between Union Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the State of Utah, as party of the first part, and Trans-Mississippi Grain Company, a corporation organized and existing under and by virtue of the laws of the State of Illinois, as party of the second part,

Witnesseth;

Whereas, an Agreement has been entered into between said companies, dated the 1st day of August, 1905, with reference to the construction and operation of a certain grain elevator building in the City of Council Bluffs, Iowa (hereinafter called the "Original Agreement").

And Whereas, in the preparation of said Original Agreement in its written form there was an error or mistake in one particular, and the said Original Agreement as so prepared and executed does not evidence the real intention and agreement of the parties in the said particular referred to, being the matter referred to below.

Now, Therefore, in order to correct the mistake or error referred to, and to make said Original Agreement as written conform in all particulars to the real intention and agreement of the parties thereto, it is hereby agreed that the said Original Agreement shall be and is hereby amended, modified and corrected by striking out from the fourth line of the fourth clause of Article I thereof, the words "and
354 until February 7th, 1909", so that hereafter the said fourth clause shall be and read as follows:

"4. Said Railroad Company will deliver to said elevator all grain originating on its lines and transported thereover which may be consigned to or in care of said elevator, and will pay to said Grain Company, its successors or assigns, on all such grain transferred through such elevator, a transfer charge equal to the rate or rates from time to time and currently paid to the Omaha Elevator Company at Council Bluffs, Iowa, or any other elevator rendering like and similar transfer service to said Railroad Company, at either Omaha, Nebraska, or Council Bluffs, Iowa, but only when and while such transfer charges are paid by said Railroad Company to said Omaha Elevator at Council Bluffs, Iowa, or to any other elevator in Omaha, Nebraska and if such payments are judicially determined to be unlawful, or if from any other cause, the payment of any such transfer charges to any such other elevator is not made, or suspended, the obligation to pay the transfer charges under this agreement is for the corresponding period also suspended. Such compensation for the transfer service to be rendered by the Grain Company, at no time shall exceed the transfer charges customarily made upon similar business at the same or similar points. Such payments to be made upon the 20th day of the following month in which the transfer service is performed, but no transfer charges will be made or imposed against Union Pacific Railroad Company on any grain whatever, switched to or handled through said elevator, which is transported to Omaha or Council Bluffs by any other than Union Pacific Railroad Company".

355 And said Original Agreement is not amended or changed or modified in any other particular by this Supplemental Agreement, and all the terms and conditions of said Original Agreement shall be and continue in force with the exception of the said amendment, correction and modification by striking therefrom the said words.

In Testimony Whereof, the parties hereto have caused these presents to be duly executed by their respective officers thereunto duly authorized, attested by their respective

secretaries, with their respective seals attached, the day and date first above written.

Executed in Duplicate.

UNION PACIFIC RAILROAD COMPANY,

(Seal) By (Sgd) A. L. Mohler,
Vice President & General Manager.

Attest: (Sgd) Jos. Hellen.

TRANS-MISSISSIPPI GRAIN COMPANY,

By (Sgd) F. S. Cowgill, President.

Attest: (Sgd) S. E. Baker, Ass't Secretary.

(Seal)

356 Defendant's Exhibit 5.

(Pages 309 to 326 inclusive, Vol. 10 Interstate Commerce Reports).

Matter of Allowances to Elevators 309.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company

Decided June 25, 1904.

The U. P. R. Co. entered into contracts with P. & Co. under which the latter erected grain elevators at Council Bluffs and Kansas City for the transfer of grain at those terminals of the U. P. System, and for the service of transferring grain by elevator at said points the U. P. agreed to pay P. & Co., 1¼ cents per 100 pounds. Corporations controlled by P. & Co. were formed to conduct the elevators at each point. P. & Co. are large buyers and shippers of grain in the northern and western grain producing states and control a large number of country elevators. In making this arrangement the U. P. acted in good faith, and the facts indicate that 1¼ cents per 100 pounds is not an excessive charge for the service as conducted by the elevator companies. The real complainants in this proceeding are carriers competing with the U. P. who claim that if this arrangement is not declared illegal, they will be compelled to make similar allowances at transfer points on their lines, and no shipper nor any dealer in competition with P. & Co. has appeared to complain or protest in any manner against this arrangement. Held:—

357 1. That the compensation paid for the elevator or transfer service is not unreasonable.

2. That the U. P. is entitled to perform the work itself or hire it done by others and is not legally at fault or guilty of wrong-doing because incidentally those employed by the carrier to transfer the grain are aided more or less in another line of business in which they are engaged.

3. That any injury or detriment resulting to rival carriers under the arrangement is something which the law does not seek to prevent.

J. N. Baldwin and J. C. Stubbs for Union Pacific R. R. Co.

M. B. Koon and Frank Hagerman for Omaha Elevator Company and Midland Elevator Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Railway Co.

Report and Opinion of the Commission.

Knapp, Chairman.

Acting upon information in the nature of informal complaint the commission instituted this inquiry on its own motion to ascertain the facts respecting allowances by the defendant company to the owners of certain elevators and to determine whether, as is claimed, those allowances are in violation of law.

The Union Pacific Railroad Company operates an extensive system of railways in the states of Nebraska, Kansas, Colorado, Wyoming and Utah. The principal line of this system extends from Council Bluffs, Iowa, to Ogden, Utah, and there is another main line from Kansas City, Missouri, to
358 Denver, Colorado. These two lines are connected by a line from Denver to Cheyenne, Wyoming, and for a point on the latter there is a connecting line to Julesburg on the line first described. There are also various auxiliary and branch lines in the states above [mention], the total mileage operated being nearly three thousand miles. The eastern termini of the system are at Council Bluffs and Kansas City, both located on the Missouri River. No line leading easterly or southerly from those points is owned or controlled by the Union Pacific Company.

The lines competing with the Union Pacific in Nebraska are the Burlington, the Rock Island and the Nebraska Division of the Chicago & Northwestern, formerly the Fremont, Elkhorn & Missouri Valley. There is limited competition in that State with the Omaha Road, a part of the Northwestern System, and with the St. Joseph & Grand Island. In Kansas the principal competitors of the Union Pacific are the Atchison, the Missouri

Pacific and the Rock Island. To some extent the Burlington and the Missouri, Kansas & Texas are competitors in the last-named state.

Of the carriers above named the Burlington, the Rock Island and the Northwestern have lines extending easterly from Council Bluffs and Omaha to Chicago. The Burlington and the Northwestern also have lines connecting Nebraska points with Chicago which do not pass through Omaha and Council Bluffs. The Burlington, the Rock Island and the Atchison have lines extending easterly from Kansas City to Chicago.

The Missouri Pacific has its northern terminus at
359 Omaha, and all its lines are west of the Missouri River.

The Missouri, Kansas & Texas system is mainly south and west of Kansas City and St. Louis, though it has a line to Hannibal on the Missouri River. The St. Joseph & Grand Island is wholly in Kansas and Nebraska.

There are several important roads which extend easterly from various points on the Missouri River, but have no lines west of that river. Among these are the Chicago, Milwaukee and St. Paul, and the Wabash, reaching both Omaha and Kansas City; the Chicago Great Western, reaching Omaha, St. Joseph and Kansas City; the Illinois Central, reaching Omaha; the Chicago & Alton, reaching Kansas City and St. Louis; and the Toledo, St. Louis & Western, reaching St. Louis. So far as concerns the question in this case the Union Pacific is the only extensive system operating wholly in the territory west of the Missouri River.

In the states of Nebraska and Kansas there is a large production of grain which moves over the lines of the Union Pacific to the Missouri River on its way to eastern and foreign markets. If this grain is carried to destination in the Union Pacific cars in which it is originally loaded, the transportation must be completed by connecting lines over which the Union Pacific has no control. As the principal markets of consumption are in the eastern states and foreign countries, the grain must be carried long distances to reach domestic destinations or the ports of trans-shipment abroad. In such case the cars are absent from the orginating roads for considerable periods of time and the interval before their return is a matter of uncertainty. When this method of transporting the grain
360 is employed the Union Pacific must relinquish possession of its cars at the Missouri river and can get them back again only after prolonged and indefinite absence. In the meantime the company is deprived of the use of such cars and cannot know when they will again be available for its own shippers.

For the most part grain is transported in bulk in ordinary box cars, the same as those used for miscellaneous freight. The movement is not constant and regular throughout the year but is largely confined to comparatively short seasons, depending more or less on the size of the crop and the range of obtainable prices. During the grain shipping seasons there is a pressing demand for cars, particularly when market conditions tend to stimulate sales. It is a matter of common knowledge that the last few years have been exceptionally prosperous in all branches of business. Not only has the grain production in the states named been greatly increased, but traffic of all kinds has been offered for carriage in unprecedented volumes. Although the Union Pacific—in common with other roads—has made large additions to its car and locomotive equipment, it has frequently been unable to meet the requirements of shippers. The growth of its traffic has exceeded the increase of its transportation facilities. Under these circumstances it could ill afford, in justice to its own patrons, to allow its cars to pass from its control and to be absent for varying and uncertain periods, in order to carry to destination the grain originating on its lines.

Moreover, the loading of cars at the country stations,
361 either because the older cars of the Union Pacific are of low capacity or because of conditions at the point of origin, is in most cases comparatively light. The economical movement of this grain for the long distances it is carried east of the Missouri River requires a heavier loading of cars than can ordinarily be secured at the local stations of the initial road. It seems reasonable to believe that in actual practice the original loading of grain cars on the line of the Union Pacific would generally fall below the loading needful to the cheapest hauling of the grain to remote destinations.

For these and perhaps other reasons it became highly important, if not absolutely essential, for the Union Pacific to provide for the transfer of this grain to other cars than its own at its termini on the Missouri River. Such a transfer was practically necessary to secure the prompt release of its equipment, to enable it to retain the control and use of its cars and thereby to better satisfy the demands of shippers upon its lines. This requirement of the situation could be met by the Union Pacific either by arranging for the transfer by its own appliances and employees or by contracting with others to perform the required service. The latter course was adopted and thereupon an agreement was entered into which will now be described.

This agreement was executed under date of February 7, 1899, and the contracting parties are the Union Pacific Railroad Company and Frank H. Peavey of Minneapolis, Minn. The provisions of the contract are somewhat elaborate but those material to the present controversy can be briefly stated. The
362 railroad company agreed to convey to Peavey a certain tract of land in Council Bluffs, containing about 90,000 square feet, and any additional land adjoining the same that might be required to enlarge the elevator building which Peavey was to construct; to provide yard room and maintain a system of side tracks and switches in connection with such elevator, according to plans shown on a map attached to and made a part of this contract; to deliver to said elevator all grain originating on its lines and transported thereover which might be consigned to or in care of said elevator, and to pay Peavey on all such grain transferred through said elevator a transfer charge of not exceeding one and one-quarter cents per one hundred pounds during the first ten years of the contract, and not exceeding one cent per hundred pounds thereafter, but at no time more than the transfer charge customarily made on similar business at similar points; to provide for said elevator equal privileges and advantages to those granted any other elevator then or thereafter served by it at Omaha or Council Bluffs, and to switch free of charge all cars, loaded, or empty, to and from said elevator, between points on its road within ten miles of Omaha; to receive from and deliver to connecting roads at Council Bluffs cars for loading, unloading or transfer of grain at said elevator as cheaply as it handles cars for loading, unloading or transfer to any other elevator at Omaha or Council Bluffs, and not exceeding such aggregate sum in any one year as will equal five per cent on its investment, as described in the contract, the total cost to be apportioned between the several lines on a wheelage basis; and to permit
363 other connecting roads at Council Bluffs to use said side tracks and switches for access to said elevator upon terms stated at length in the contract, which are not claimed in this proceeding to be unfair or unreasonable.

Peavey, on his part, agreed to erect on said premises and have ready for operation by June 1st, 1899, a first class elevator, equipped with modern appliances, of the capacity of about 1,500,000 bushels, and thereafter to maintain the same in like condition; to receive from the railroad company any grain originating on its lines consigned to or in care of said elevator to the capacity thereof, and to promptly transfer such grain from the company's cars through said elevator, the grain tendered by the company to be first transferred and its cars

promptly released; and to receive and safely store in said elevator for forty-eight hours free of charge any grain originating on the company's lines and delivered from its tracks at said elevator for storage or transfer.'

In pursuance of this contract the elevator was built at a cost of about $200,000. It was completed in the summer of 1899 and has been in operation since that time. While the elevator was in process of construction or soon afterwards, as we infer, Peavey assigned his interest in the contract, with the consent of the Union Pacific, to the Omaha Elevator Company, a corporation which appears to have been organized for the purpose of acquiring the elevator plant and business, and which has since owned and conducted the same. This involved no substantial change of proprietorship, as a controlling
364 interest in the stock of the corporation has always been owned by members of the firm of F. H. Peavey & Co., of which Frank H. Peavey was the senior partner. He died in December, 1901, but the business has been continued by the surviving partners and those interested in the estate, as we understand, under the same firm name. In other words, this firm is the virtual owner of the elevator in question and the beneficiary of the contract with the Union Pacific.

A similar situation exists at Kansas City, and a similar arrangement was made by the Union Pacific for the transfer of grain at that point. The elevator there is located in Kansas City, Kansas, which is commercially the same as Kansas City, Missouri. This elevator, which has a capacity of about 1,000,000 bushels, is operated by the Midland Elevator Company, a corporation whose capital stock is substantially all owned by the individual members of the firm of F. H. Peavey & Co. There appears to be no written agreement between the Union Pacific and the Midland Elevator Company, but the terms upon which grain is transferred and stored by the latter company, and the other incidents of its relations with the Union Pacific, are practically if not identically the same as those provided in the contract with the Omaha Elevator Company above described. For this reason it seems unnecessary to make more specific findings in regard to the Midland Elevator Company or to separately discuss the questions presented by the contract with that company.

These agreements appear to have been carried out in conformity with their terms and to the mutual satisfaction
365 of the parties thereto. It is not claimed that any greater allowances are made to the elevator companies, or that any other benefits are derived by the owners thereof, than those accorded by the contracts in question; the contention is

that the observance and execution of these contracts, by reason of facts about to be stated, secure to Peavey & Company undue preference and advantage and subject other shippers to undue prejudice and disadvantage.

F. H. Peavey & Co., according to the testimony of a member of that firm, are grain merchants and owners of elevator properties. They appear to have some 450 country elevators, as they are called, in the states of North Dakota, South Dakota, Minnesota, Iowa, Nebraska and Kansas, besides larger elevators at Council Bluffs, Kansas City, Duluth, Minneapolis and Chicago, and their business is extensive in the states named and elsewhere. As above found, they control and virtually own the two elevators at Council Bluffs and Kansas City. They are also large buyers of grain upon the Union Pacific system. So much of the grain thus bought as is consigned to Omaha or Council Bluffs, that is to the Omaha Elevator Company, is purchased in the name of that company; that which is consigned to Kansas City appears to be bought in the name of the Midland Elevator Company; but this does not matter in one case or the other. The practical identity of the three concerns renders the form of the transactions quite unimportant. It is sufficiently accurate, therefore, and serves the purpose of convenience, to speak of Peavey & Company as grain buyers and shippers on the lines of the Union Pacific.

366 While no definite figures were given, it is fairly inferable from the testimony, and was understood to be admitted in a general way, that Peavey & Co. handles some sixty per cent perhaps more, of the grain shipped from Union Pacific stations. Substantially all the grain so shipped by them is transferred through these Peavey elevators, and on all that grain they are paid the 1¼ cents per 100 pounds for making the transfer. At Kansas City, however, a small amount of this grain is consumed locally, and any transfer charge collected on such grain is refunded. It also appears that little or no grain is transferred through these elevators for other parties, although the Union Pacific has the right to require such transfer under the terms of its contract. The reason assigned for not exercising this right is that the Union Pacific can and does, as a practical matter, provide for the through transportation of grain shipped by other dealers without transfer at its terminals. In the interchange of carload traffic the Union Pacific takes to points on its lines a large number of cars belonging to its connections, and many of these cars are available for return loads of grain. In some cases also, as it seems, Union Pacific cars loaded at interior stations with grain of such dealers are allowed to go to destination, or at

least to points east of the Union Pacific lines. To some extent there appears to be shovel transfer for shippers other than Peavey & Company. In these ways, it is said, the grain shipments not controlled by that firm are fully accommodated without the necessity of a transfer through the elevators in question.

Some indication of the amount of the grain transferred
367 by the Peavey elevators appears from a statement produced at the hearing. That statement shows that 12,329,381 bushels were transferred at Kansas City between July 1st, 1898, and May 1903; and that 23,839,533 bushels were transferred at Council Bluffs between July, 1899, and May 1903. The amount varies greatly in different years. For example, the lowest year at Council Bluffs was 2,953,776 bushels, the highest 8,695,594; at Kansas City the lowest was 1,120,441 bushels, the highest 4,673,850.

Now, in view of these and other related facts, it is charged that the Union Pacific arrangement with these elevator companies owned by Peavey & Co., is preferential and unlawful. This charge is based at last upon the claim that the contract price for transferring grain is exorbitant and unreasonable, that it is much greater than the necessary cost of performing the service and that, therefore, it has the indirect but actual effect of a prohibited concession or rebate to Peavey & Co., because they are the shippers of the grain thus transferred at a profit through their own elevators. In the language of one of the briefs: "The contention is that the payment of a cent and a quarter per hundred pounds is excessive, and the resultant effect of operations under said contract, and upon the basis therein provided, is that the Union Pacific Railroad Company discriminates in favor of the two elevator companies as grain shippers; that the allowance of a cent and a quarter per hundred pounds, paid to the said elevator companies for transferring their own grain, amounts in its ultimate result
to a rebate because it so much reduces the through pub-
368 lished rate, in favor of said elevator companies, but not in favor of other shippers."

This is the controverted question of fact which will now be considered. To this question much of the testimony was directed and widely divergent claims are made by different parties. Among the proofs submitted is a statement from the books of Peavey & Co. produced by a member of that firm, showing the receipts and expenses of the two elevators for a period of years. From this statement, the accuracy of which was not seriously questioned, it appears that the total earnings of the Council Bluffs elevator for the transfer of grain

from July, 1899, to June, 1903, were $157,639.96; the expense of operation, including taxes, insurance on building, maintenance and repairs, $110,468.30; and the aggregate profit $47,171.66, or an average annual profit of $11,792.91. At Kansas City the earnings for transferring grain from July, 1898, to May, 1903, were $92,069.63, the operating expenses, including the same items, $77,500.00, the aggregate profit $14,569.63, the average annual profit $2,913.92. This allows nothing in either case for interest or investment, depreciation of plant, insurance on grain in storage or expenses of general management. The elevator at Council Bluffs cost $200,000 the one at Kansas City $150,000. If these figures are substantially correct, as we assume they are, it is evident that the transfer business, considered by itself, was unprofitable, and that Peavey & Co., could not afford to construct and operate these elevators for the sole purpose of transferring grain at 1¼ cents per hundred pounds.

369 The chief traffic officer of the Chicago Great Western testified that elevators were operated by that road at Kansas City and St. Joseph through which a large amount of grain is transferred at a cost, not including taxes or expenses of general management, of 1 1-6 cents per hundred pounds, and that he would be very willing, for reasons stated by him, to pay an independent company 1¼ cents for performing the service. It also appears that another carrier pays one cent per hundred pounds for transferring grain at Burlington, Iowa, and has done so for a number of years. This payment is made to a firm which buys extensively on the lines of that carrier and whose business is similar to that conducted by Peavey & Co. It should be stated, however, that the allowance to this concern is claimed to be made, partly at least, because of the transfer charges paid to their competitors, Peavey & Co., at Council Bluffs and Kansas City.

Other facts disclosed tend more or less to show that the allowance to Peavey & Co. is not unreasonable. For instance, at Council Bluffs there is another elevator, with a capacity of 750,000 bushels, belonging to the Union Elevator Company, The stockholders of that company are six railroads, viz: the Union Pacific, the Northwestern, the Burlington, the Rock Island, the Milwaukee and the Wabash, each owning a one-sixth interest. This elevator is leased to and operated by the Trans-Mississippi Grain Company, and that company transfers grain through its elevator on the same terms and conditions that grain is transferred through the Peavey elevators. The Trans-Mississippi Grain Company is also, as we understand, a large

buyer and shipper of grain. To the extent of its
370 business, therefore it seems to be in much the same situation as Peavey & Co. and in like relation to other buyers on lines where its purchases are made. The fact that a rival concern, operating over various roads in that section of country, receives the same compensation for transferring grain as Peavey & Co., is some indication that the amount paid is not excessive.

A like inference apparently follows from comparison with elevator charges fixed by state regulation or customarily paid at other points where large quantities of grain are handled. Without detailing the figures it is sufficient to say that the prices elsewhere applied, taking into account differences of conditions, do not establish the claim that Peavey & Company are unduly remunerated.

Moreover, it was not seriously contended that Peavey & Co. in fact pay any more for grain than other buyers. One witness, it is true, expressed a rather vague opinion to the contrary, but aside from his statement the testimony was unqualified that the arrangement in question had not affected the prices paid to the producer. In other words, using the phrase frequently heard, the transfer charge was not "reflected into the interior". This was affirmed or admitted by all the traffic officials of other roads who were called to testify, with the single exception mentioned.

In this connection we are asked to consider the apparent absence of complaint by rival dealers respecting the arrangement in question. The shippers of grain from Union Pacific stations, other than Peavey & Company, are quite numerous,
and the business of some of them must be of consider-
371 able extent. In the aggregate they handle nearly forty per cent of the grain originating on that system. Of the 202 country elevators on the Union Pacific in Nebraska, only 71 appear to be operated by Peavey & Co.,; and of the 182 in Kansas, only 40 are owned by that concern. This shows a competitive interest of substantial proportions. The failure of competing shippers to make known their grievances, if they have any, or to so much as send a letter of remonstrance to the Commission, is some indication that they have not regarded the payment of these transfer charges as an undue preference to Peavey & Co. The Freight Traffic Manager of the Union Pacific positively asserts that no shipper has complained to his company, and nothing has occurred in the course of the inquiry to suggest that he is misinformed or mistaken in that regard. But this elevator arrangement must

have been known for a considerable time to other grain buyers upon the Union Pacific system and elsewhere. It was publicly disclosed before the Commission at Kansas City in 1902, and appears then to have been generally understood. The first hearing in this case, at Chicago in June, 1903, when the written contract was produced, was the subject of newspaper report which gave extended publicity to these transfer charges and to the fact that they were under investigation. There is little doubt that the main features of these contracts, or at least the amounts paid thereunder for the transfer of grain, were long ago brought to the knowledge of competing shippers on the lines of the Union Pacific and to other buyers of grain in that part of the country. Yet no shipper has volunteered to come forward or been produced as a witness to
372 sustain the accusation of unlawful conduct. The Commission is aware that wrong-doing has often been suspected in connection with elevator allowances at various points, and is likewise aware that those who obtain such allowances appear to control the greater part of the grain business. For this reason it is somewhat surprising that the competitors of Peavey & Company have failed in this proceeding to offer any objection to the transfer charges received by that firm, if those charges are believed by them to operate to their disadvantage. So far as their silence has any significance it would seem to discredit the claim that Peavey & Company are excessively paid.

Against evidence of this character is proof of the amounts said to be paid for transfer at various points and under conditions of alleged similarity. There is more or less shovel transfer at one place and another at a cost stated to range from $1.25 to $1.75 per car. The Rock Island pays at Kansas City $2.00 per car for cars under 50,000 pounds, $2,25 for cars over 50,000 pounds and under 60,000, and $2.50 per car for cars over 60,000 pounds. The Atchison pays $2.00 per car to a small elevator at Argentine, near Kansas City. The Burlington produced a contract for the construction of a large elevator at Harlem, across the river from Kansas City, and the transfer of grain by parties agreeing to erect the same for $1.75 per car, but it appears that nothing has been done to carry out this contract. Moreover, it contains a provision, as we understand it, that if transfer charges at Kansas City are made greater "by custom or otherwise"
the owners of the elevator "shall have the right to
373 withdraw from this arrangement for transfer." The Vice President of the Burlington also stated that his company owned an elevator at East St. Louis, where grain

was transferred at a profit for one quarter of a cent per bushel. There is no question that in so testifying he expressed his honest belief at the time, but it is fairly certain that he was mistaken. A statement subsequently filed by him, purporting to show the actual performance of that elevator for the year ending June 30, 1903, shows a total of 4,057,224 bushels of grain transferred during that period. At ¼ cents per bushel this would give gross receipts for transferring of only $10,143.06. As the elevator is stated to represent an investment of over $250,000, it is evident that it did not and could not make money in transferring grain at ¼ cent per bushel, however profitable its entire business may have been during that year.

Taking into account the whole evidence bearing upon the question and giving due consideration to all the facts disclosed, we are unable to find that the amount paid Peavey & Co. for transferring grain is unreasonable under the circumstances surrounding the Union Pacific. No reason is suggested why the arrangement should not be presumed to be just and fair, and nothing has been shown, in our judgment, to overcome that presumption. It may be that the needs of the Union Pacific do not require such large and expensive elevators, and that the necessary transfer could be effected by other means and with a smaller expenditure. Even if that be so, and at most it is quite uncertain, we would not be warranted in finding the carrier guilty of wrong-
374 doing unless something substantial appeared, which we do not perceive, to impeach the honesty of the transaction. So far as we can see, these transfer contracts were made in good faith, for the legitimate protection of the Union Pacific, and there is failure of proof of any unlawful purpose connected with the arrangement. True, the Burlington says it would be willing to make the transfer without charge, but that, of course would be upon condition that it secured the carriage of the transferred grain. To obtain the traffic and consequent earnings it might very likely afford to stand by its offer, but that is far from proving that the price paid to Peavey & Co., exceeds the actual or reasonable cost of performing the service.

Some testimony was given as to the feasibility and expense of what is called shovel transfer. This method may be cheaper under favorable conditions and for a limited volume of business, but for the extensive grain traffic of the Union Pacific it is of doubtful economy and otherwise unsatisfactory. The only efficient and adequate mode of transfer is through eleva-

tors of large capacity located at the terminals where the transfer is to be made. This being so, it was proper and legitimate for the Union Pacific to enter into the arrangement in question; and that arrangement, from the standpoint of the carrier's interest, was expedient and desirable.

Undoubtedly the general business of Peavey & Co., is greatly benefited by the ownership of these elevators, and this they freely admitted. As a practical matter they need at some point a large amount of storage room, where grain can
375 be graded and "blended", or held to await favorable market conditions at points of destination. These and other like advantages are secured to them by operating the two elevators at Council Bluffs and Kansas City, and for this reason they can well afford to transfer grain for the Union Pacific at a price which otherwise they would not be willing to accept. As a transfer proposition pure and simple, taking into account the cost of these elevators and the expense of their operation, it would not seem to be attractive; by reason of its incidental aid to the extensive business of these grain merchants it is undoubtedly a very profitable arrangement.

It should perhaps be added that no allowance is made by the Union Pacific to any country elevator whether owned by Peavey & Co. or by other parties. As we understand the matter the only elevators to which allowances are made are the terminal elevators described in this report. It is also the fact that no charge is made by Peavey & Co. in any case to roads taking the transferred grain from these elevators for carriage to destination.

This brings us to the statement that the real complainants in this case are carriers directly competing with the Union Pacific or operating in the same general territory. These carriers allege, as above stated, that the transfer charges paid to Peavey & Co., are excessive and unreasonable, and that they have the effect of an illegal discrimination in favor of that firm and against other shippers of grain. They also say, and this is perhaps the main ground of their objection,
376 that if these charges are not unlawful, and the Union Pacific continues the arrangement indefinitely, they will be obliged to make similar allowances for a like service at points where the transfer of grain may by them be deemed necessary. We quote again from the brief already referred to as follows: "If the allowance be permitted to stand the other railroads in the competitive territory must necessarily meet it in dealing with their patrons, or suffer their patrons and themselves to be placed at a constant disadvantage, with the tendency of creating in that territory a grain buying monopoly in

favor of the Peavey elevators, and a grain haul monopoly in favor of the Union Pacific Railroad Company."

With reference to this aspect of the matter, it may be mentioned that in one important respect the conditions at Kansas City are unlike those at Council Bluffs. Kansas City is a grain market. A large portion of the grain carried to that point is sold there, actually changes ownership there, after the manner of a grain market, although most of it is then taken on to other destinations. For this reason, grain at Kansas City becomes subject to competition between all the lines leading easterly and southerly therefrom, some of which do not extend west of the Missouri River. On this account, it is said, the roads bringing grain to Kansas City lose control, if it, so to speak, at that point and the transportation is continued by connecting lines. In other words, the originating roads which extend through to Chicago, for example, like the Atchison and the Burlington, have no advantage in this respect over originating roads which terminate at Kansas City, because of
377 the general buying and selling which there takes place, and because through rates to the east are the same as the combined rates in and out of Kansas City. It was testified by officials of the Atchison, the Burlington and the Missouri Pacific, that the amount of grain taken out of Kansas City by their respective lines is small in comparison with the amount which they severally carry to Kansas City in the first instance. Consequently, they say that they are under as much compulsion to transfer grain at Kansas City, for the release of their equipment and other purposes, as is the Union Pacific at either of its eastern terminals. Therefore they must provide the same facilities or make the same allowances for grain transfer at Kansas City, and perhaps other places as may escape disapproval in this proceeding in the case of the Union Pacific. Whether this be true to the extent claimed is not altogether certain, but it may be assumed to be so without affecting the legal question involved because, in our view of the law, the materiality of the fact is not apparent.

Conclusions.

However objectionable the arrangement in question may appear from any point of view we are convinced, rather against our original impressions, that it cannot be adjudged unlawful. This conclusion follows from our determination of the controlling facts, and there is no occasion for extended comment. We have found that these contracts for transferring grain were made in good faith and for a legitimate purpose, and that the compensation paid is not unreasonable for the service
378 performed. The parties were competent to contract, the thing done, is proper and necessary to protect the

interests of the carrier, the consideration is not excessive and the honesty of the transaction is unimpeached.

Assuming the correctness of these findings, which seem to us to be required by the evidence, we are constrained to hold that no violation of law has been established. It may be that Peavey & Co. as grain shippers secure important advantages over their competitors by reason of these elevator allowances, and this we think is at least the probable effect of the arrangement, but it does not follow that the Union Pacific is chargeable with disregard of its legal obligations. If this carrier had the right to contract for the transfer of grain at its eastern terminals, which appears to be undisputed, and if the contracts were made in good faith and the amount paid fair and resasonable, all things considered, so that the required service is obtained at no greater cost than would otherwise have been incurred, as we have substantially found, how is the transaction rendered unlawful by the circumstances that the parties contracted with are grain shippers who as such may be greatly benefited by the arrangement? The Union Pacific was not debarred from dealing with Peavey & Co., because they happen to be grain merchants as well as elevator proprietors. It was open to the carrier to do this work itself, by its own agencies and employes, or to hire it done by others if deemed more expedient; and there was nothing to prevent an honest bargain with whomsoever would undertake to furnish the desired facilities, not excluding those who were also important
379 shippers. This being so, the Union Pacific is not legally at fault or guilty of wrong-doing because it turns out, as an incidental result, that the persons employed to transfer grain are thereby aided more or less in another line of business in which they are engaged. This in effect, as we think, decides the question presented.

It is urged, however, by other carriers, claiming to be in the same situation as the Union Pacific, that refusal to condemn the transfer charges paid by that company will oblige them to make similar allowances for like service at Kansas City and elsewhere. This apprehension on their part may be well founded, but how does that alter or affect the legal rights of the respondent? The law imposes no duty upon the Union Pacific to safeguard the business of its competitors or the shippers they serve. Granted that the allowance to Peavey & Co., places these other carriers, and grain dealers on their lines, at some commercial disadvantage, that it introduces an element of competition which they will be forced to equalize—and that would seem to be its character so far as rival roads are concerned,—on what theory can the Commission interfere so long as the obligations of the Union Pacific to its own shippers are

not disregarded? Plainly, as it seems to us, the indirect effect of the arrangement upon other lines or those who patronize them, whatever that effect may be, is no more a violation of the Act than would be a reduction of the rate by the Union Pacific which a competing road, in justice to its shippers or in its own interest, might feel compelled to meet. Any resulting injury or detriment to rival carriers is something which
380 the law does not and perhaps should not seek to prevent.

It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated, because any resulting discrimination may not be undue, but the situation created cannot be wholly satisfactory. Under existing conditions the transfer of grain through elevators at various points seems to be a virtual necessity both to the grain carrier and the grain dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

381 Defendant's Exhibit 6.

(Pages 86 to 95 inclusive, Vol. 12, I. C. C. Reports).

Allowances to Elevators by U. P. R. R. Co.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Decided April 9, 1907.

Rehearing of the Petition of the Chicago Great Western Railway Company, The Chicago, Burlington & Quincy Railway Company and the Atchison, Topeka & Santa Fe Railway Company.

1. Elevation is defined as unloading grain from cars or grain-carrying vessels into a grain elevator and loading it out again after a period of not to exceed ten days; it does not include "treatment", or grading, cleaning, and clipping of grain; and retention in an elevator beyond ten days becomes storage and is not a part of the service of elevation as that word is used in the statute.

2. The law clearly recognizes elevation as a facility which the carrier may provide, and this authorizes the carrier to grant grain elevation at destination or while the traffic is in transit, subject only to the restriction imposed by the fact that elevation, like any other service offered by the carrier to shippers, must be open to all on equal and reasonable terms.

3. Since a carrier subject to the act to regulate com-
382 merce is entitled to provide elevation for grain shipments, such carrier may either construct and operate the elevator itself or furnish elevation by arrangement with the owner of an elevator; and the amount of compensation paid by the carrier to the owner of an elevator rendering the service is of no concern to shippers or to other carriers, unless it operates to affect the rates charged by the carrier upon the grain traffic or by some other device a portion of the allowance is returned to shippers and this becomes a rebate.

4. An allowance made to a shipper of grain, who furnishes elevation service under an arrangement with a carrier, is a rebate and an unlawful discrimination when it involves a profit over and above the actual cost to such shipper of the service rendered. It is not a rebate when the allowance does not so exceed the actual cost. The arrangement between the Union Pacific Railroad Company and the Peavey elevators at Council Bluffs and Kansas City is not in itself unlawful. But the allowance of 1¼ cents per hundred pounds paid by the railroad company to these elevators, controlled by the Peavey interests, who are large shippers of grain and own practically all the grain going into the elevators, is in excess of the actual cost of the service, and is a rebate, and therefore unlawful. Ordered, That such allowance be reduced and shall not exceed three fourths of a cent per 100 pounds.

Davis, Kellogg & Severance for Chicago Great Western Railway Company.

Gardiner Lathrop for Atchison, Topeka & Santa Fe Railway Company.

383 J. W. Blythe, C. J. Greene, and J. E. Kelby for Chicago, Burlington & Quincy Railway Company.

J. N. Baldwin for Union Pacific Railroad Company.
Hagerman & Koon for Peavey & Company.

John H. Marble for the Commission.

Report and Order of the Commission.

Harlan, Commissioner.

The allowances on grain received over its lines that have been made for some years by the Union Pacific Railroad Company to the Omaha Elevator Company and the Midland Elevator Company, proprietors of certain elevators at Council Bluffs and Kansas City, commonly known as the Peavey Elevators, were the subject of an investigation undertaken by the Commission on its own motion prior to June 25, 1904, on which date the report and opinion of the Commission was announced. Subsequently, in July, 1906, the proceeding was reopened upon the petition of certain railroad companies interested in the grain traffic of the territory tributary to those points, and much additional testimony was taken, upon which, as well as upon the original record, the whole matter has now been fully reheard; the oral arguments of counsel having been supplemented by printed briefs.

The pertinent facts developed upon the original inquiry are set forth in detail in the report and opinion then announced (Vide 10. I. C. C. Rep. 309) It will not be necessary, therefore, now to restate them. Since that time Omaha has become a grain market of sufficient importance to support fifteen grain elevators and to maintain a grain exchange whose members handle a large volume of grain
384 shipments. The testimony adduced on the rehearing shows that the allowance of 1¼ cents per 100 pounds heretofore made to the Peavey elevators only, and more recently to the Trans-Mississippi Grain Company, has been extended to all other elevators at the cities above mentioned. Much testimony has been offered tending to show that the allowance is excessive and operates as a rebate. The statute itself has also been amended so as to include "transfer in transit", "storage" and "elevation" among the facilities of transportation which interstate carriers must or may provide for their shippers. (sec. 1). But aside from these matters the material aspects of the proceeding remain unchanged. It will suffice therefore briefly to state the conclusions reached by us upon the rehearing without further reference to the history of the matter as disclosed upon the whole record.

Elevation, as commonly understood among elevator men and among buyers and sellers of grain, signifies the unload-

ing of grain from cars, or from grain-carrying vessels, into a grain elevator and loading it out again after storage for a period of not to exceed ten days. The "treatment", or grading, cleaning, and clipping of grain is not properly a part of "elevation" as the word is strictly used, and the retention of grain in an elevator beyond the period of ten days becomes storage and is not elevation. It is in this sense that the word is used in the amended statute. Without undertaking at this time definitely to decide to what extent under the amended act the furnishing of elevation as thus defined is a compulsory requirement, it is clear that the law recognizes elevation as a facility which a carrier may provide for the bene-
385 fit of its shippers if it finds it to its interest to do so. This being the case, we see no warrant in law for holding, as is suggested, that such elevation cannot be provided at destination and is lawful only for the transfer of grain in transit. The law seems to clothe carriers with the right to furnish elevation at any point where it may be a convenience to shippers. The only restriction imposed by the act in that connection is that the elevation offered like any other service a carrier may hold out to shippers as an inducement to send their traffic over its line, must be open to all on equal and reasonable terms. It is true, as is said, that the usual practice is for consignees to do their own unloading at destination. But clearly there is nothing in the law or in public policy that forbids a carrier to unload for them if it does so for all shippers alike. Generally speaking, a carrier may build up its traffic by offering its shippers any facilities of that nature. We understand it to have been so held by both the Courts and by this Commission.

Having the right under the law to provide elevation for its shippers it is not to be doubted that a railroad company may either construct and operate an elevator of its own, or may furnish elevation facilities to its shippers by making some arrangement with the owner of an elevator for such service. The amount of the compensation or allowance that may be paid to the owner for rendering such a service is not a matter of concern either to shippers or to other carriers, unless in some way it enters into the rates charged on the grain traffic and thus makes the rates excessive, or unless by some
386 device a portion of the allowance is returned to the shippers and thus becomes a rebate. And, therefore, whether the allowance now made by the Union Pacific Railroad Company to the owners of the elevators at Council Bluffs and Kansas City be called an allowance for the prompt release of its equipment, or for the transfer of the grain in transit, or for elevation, we adhere to the view expressed in

the original report and opinion of the Commission that such an arrangement, embracing as it now does all the available elevators at the points named and not being confined to the Peavey elevators only, is in itself not unlawful. By whatever name it may be called, the service actually rendered is in fact elevation and may be so regarded under the amended act. It must be understood, however, that if such elevation is furnished by the Union Pacific Railroad Company for the grain of one shipper over its lines, proper arrangements must be made by it for furnishing elevation to other shippers over its lines; for otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination against other shippers who for any reason cannot use the Peavey elevators.

The vice in the situation at Council Bluffs and Kansas City arises out of the fact that the Peavey interests, besides operating the elevators in question for the railroad company, are also extensive buyers, sellers and shippers of grain. If they were elevator men only, the amount of the allowances paid to them by the railroad company on the grain of other shippers would not have been the occasion of inquiry by the Commis-
387 sion, unless upon complaint by a shipper that the allowances entered into the rates and made them excessive or were being used overtly as a rebate. But being themselves dealers in grain, they perform a service for themslves and for their own grain, although operating the elevators under contract with the railroad company. It is for this reason that we still regard the arrangement as objectionable, although not necessarily and in itself unlawful. Such relations between a carrier and a shipper as the Peavey people enjoy with the Union Pacific Railroad Company, although more frank and open than the fictitious leases and contracts with elevator companies that are sometimes resorted to as a cover for rebates and other unlawful practices, nevertheless breed distrust and suspicion. Arrangements of that kind easily lead to abuses and ought not, therefore, to be encouraged. They not infrequently result in some unfair advantage to the shipper concerned. That is the case here. The record discloses that practically all the grain going into those particular elevators belongs to Peavey & Co. They therefore do the work under contracts with the railroad company in a double capacity and with a twofold interest in the result. They are paid by the company for performing an elevation service for its shippers, and the service they render is chiefly in connection with their own grain. Besides the profit, often quite substantial, on the mixing of an inferior with a superior quality of their grain, thus raising the average grade of all and increasing its value,

they receive an allowance for its elevation. The arrangement thus puts them on a special ground of advantage as
388 buyers and sellers and shippers of grain. It ought, therefore, to be narrowly scrutinized and examined by this Commission, and so rigidly readjusted under our order as to strip it of any possibility of working an injustice to other shippers or of resulting in a breach of the law. While we have no power under the statute to forbid a railroad company from contracting with an elevator owner for such a service, yet if the owner is also a shipper we have the authority to so regulate and control the relations between them as to protect the rights of others and to enforce the observance of the law.

Granting, then, that the allowances were not shown to be excessive upon the prior investigation, do they now appear to be unreasonable in the light of all the facts and circumstances disclosed upon the rehearing? This question we are constrained to answer in the affirmative, and to hold that enough has been shown to call for a material reduction. It is true that under the terms of section 15 of the amended act to regulate commerce a shipper may receive, in the rates charged a "just and reasonable" allowance from a carrier for any service or instrumentality furnished by him in connection with the transportation of his own property. This provision, however, must be read in connection with the other provisions of the law forbidding and making unlawful any arrangement or practice that results in an undue preference or an unjust discrimination in favor of one shipper as against others, or that results in a rebate or other departure from the lawfully published rates. And therefore, if the allowance involves a profit
389 over and above the actual cost of the service rendered, it becomes, when made to a shipper, a rebate and an unlawful discrimination to the extent of the profit realized. It is not a rebate when it does not exceed the actual cost. But to avoid that fundamental objection the actual cost of the service rendered must be the limit of the allowance.

We are satisfied from all the evidence now before us that the arrangement by the Union Pacific Railroad Company with the Peavey elevators at Council Bluffs and Kansas City, under which the latter get an allowance of 1¼ cents per 100 pounds for the prompt release of the car equipment of that line, or for elevation, or whatever the service may be called, results in an appreciable profit to Peavey & Company, which can be and is used to advantage by them as buyers and shippers. The record fairly discloses this in the superior price that they seem to be able to offer to producers in the country for their grain. And therefore the proper administration of this law, as well

as common fairness to competing dealers in grain, requires a substantial abatement in the amount of the allowance. The original contract between them, made for a long term of years, seems to have contemplated the reduction of the allowance to 1 cent per 100 pounds at the end of ten years, of which less than two years remain. This is a sufficient indication that the parties to the contract were themselves of the opinion that an allowance of 1 cent per 100 pounds, when it went into effect, would return a satisfactory profit over and above the actual cost of the service rendered. Moreover, our investiga-
390 tions have led us to the conclusion that such a service may be rendered with a reasonable and substantial profit on a charge of 1 cent. Under all these circumstances, and having regard to the letter and spirit of the law, which forbids a shipper in any form to accept or a carrier to give a rebate, we have concluded that the allowance should now be fixed at three quarters of 1 cent per 100 pounds as the maximum to be paid for such service. We are satisfied from the information acquired in this and other investigations as to the charges and practices at other points where large quantities of grain are handled and transferred, that an allowance of three quarters of 1 cent will fully and amply cover the actual cost of the elevation contemplated in the law, without returning a profit and thus becoming a rebate.

An order will be entered in accordance with these views.

Order.

Upon the foregoing report—

It is Ordered. That the Union Pacific Railroad Company be, and it is hereby notified and required to cease and desist on or before the 1st day of June, 1907, and for a period of at at least two years thereafter abstain, from giving or paying 1¼ cents per 100 pounds as and for an allowance or compensation for service rendered in the transfer, release of car equipment, or elevation of grain at Council Bluffs, Iowa, or Kansas City in the State of Missouri, or points or places in territory adjacent thereto, to any person, firm, association company, or corporation, directly or indirectly engaged or interested in the buying, selling, or shipment of grain, or to any elevator com-
391 pany or corporation owned in whole or in part, or in anywise, directly or indirectly, controlled, by one or more such persons, firms, associations, companies or corporations so engaged or interested, directly or indirectly, in the buying or selling of grain; and more particularly to so cease and desist from giving or paying such allowance to the Omaha Elevator Company, the Midland Elevator Company, or

to Peavey & Co., and to further cease and desist at the time and for the period aforesaid from giving or paying any allowance or compensation for such service in excess of three-fourths of a cent per 100 pounds of grain, to said Omaha Elevator Company, the Midland Elevator Company, or to Peavey & Co., or to any person, firm, association, company, or corporation, directly or indirectly engaged or interested in the buying, selling or shipment of grain at the places aforesaid or adjacent thereto, or to any elevator company or corporation owned in whole or in part, or directly or indirectly controlled by one or more persons or corporations engaged or interested, directly or indirectly, in the buying, selling or shipment of grain.

Clements, Commissioner, dissenting:

It is apparent that when this matter was first heard the Commission based its decision sustaining the legality of the elevator allowance to Peavey & Company largely upon the theory that the carrier had a right to unload its cars for the purpose of promptly releasing them at its terminus and also to hire this to be done by another, and that, inasmuch as the law did not prohibit its employment of the owner of the
392 freight himself to do the unloading, it followed that unless the allowance was so excessive, in view of the service rendered, as to show it to be a device for a rebate, it could not be condemned under the then existing law, although it did result in advantage to Peavey & Company over their competitiors in buying, shipping and selling grain. In other words, it was held, in substance, that the contract not being expressly forbidden, by law, any resulting advantage accruing to Peavey & Company, if the allowance was not so excessive as to be a rebate, was not undue and therefore not unlawful. The Commission said in a former decision "however objectionable the arrangement in question may appear from any point of view, we are convinced, rather against our original impression, that it cannot be adjudged unlawful'. * * * * It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded." It is evident that the Commission, by its view of the law, then felt constrained to uphold the legality of the arrangement in question, although it felt that it was objectionable and of a kind not to be desired or encouraged, and the tenor of the report now made by the majoriy is to the same effect.

Peavey & Company are in the general grain business, buying, shipping, elevating, storing, cleaning, blending, and otherwise treating the grain in various ways and selling the same on their own account. They buy in the country and have num-

erous small elevators at various purchasing points into which the grain is first placed and then shipped from time to time to their larger terminal elevators, into which they load it,
393 receiving the allowance in question. Practically all of the grain they unload is their own. It seems clear that the "elevation" which is defined in the act as a part of the transportation, is only such elevation as is incident and necessary to the movement of the grain in transit. It must follow that Peavey & Company have an advantage to the amount of this allowance over competitors against whom they bid and buy at the grainfields, at least to the extent that such allowance exceeds the actual expense to them of the mere elevation transfer of the grain in transit. The service which they render for the carrier, and which it is bound to provide, if any, is so blended with the greater service which they render for themselves that it is impossible to tell what is the cost to them of the former, though it seems evident that the proposed allowance, as well as that in force, is large enough to cover much that the elevator company does for itself and from which it derives advantage and profit as a grain dealer. Indeed it is difficult to see anything that the Elevator Company does in respect to shipments of grain which are not in good faith consigned through to actual destinations beyond which it must not necessarily be for itself.

On February 19, 1906, in the cases of the New York, New Haven & Hartford Railroad Company, Appellant, v. The Interstate Commerce Commission, and The Interstate Commerce Commission, Appellant, v. The Chesapeake & Ohio Railway Company and the New York, New Haven & Hartford Railroad Company, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct., Rep. 272, which involved the same subject matter,
394 the Supreme Court of the United States, having heard them together, rendered one opinion in which it said:

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of delaying by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all."

The prohibitions of the statute apply equally to an undue advantage or discrimination effected through the published tariff as well as to acts in disregard thereof. Applying the doctrine announced by the court in these cases to the matter

before us we have now only to look to the results of the arrangement in question, irrespective of the fact that the parties are not expressly forbidden to contract between each other on the subject.

Section 1 of the Act as amended August 28, 1906, defining transportation, expressly provides as follows: "and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor."

The provision in section 15 for reasonable allowance to the owner of the property by which the carrier for any instrumentality or service in connection with such transportation is at most permissive. Under the broad and wholesome
395 principles announced by the court a carrier should neither be permitted to plead its own failure, to itself furnish the necessary transportation facilities as commanded by the statute, nor any undertaking on its part to furnish something beyond its legal obligations, to justify a practice which culminates in the "forbidden result" of unjust advantage and discrimination. The carrier should itself afford the transportation and perform all of its legal obligations by its own services and instrumentalities. Neither the services nor instrumentalities of the shipper should be employed in the transportation of his own freight by the carrier. Such a practice will always be a hotbed for the propagation of discriminations difficult of definite proof. The opinion of the majority fixed the cost of the service rendered by the shipper as the limit which he may be lawfully allowed. It requires no argument to show that the cost to the shipper of performing the services involved is impossible of definite ascertainment, and will vary from time to time. Yet, if by reason of caution not to reduce the allowance below cost the Commission shall leave it one quarter or one eighth of a cent above cost, the vice of discrimination is still there, even when tested by the rule stated in the majority report; nor is argument necessary to show that a large grain dealer, having the constant advantage of even this margin, can so far overreach his competitors as to largely monopolize and control the business.

Being convinced that the arrangement here involved necessarily results in undue advantage to Peavey & Com-
396 pany as against those with whom they compete in buying grain, and particularly those who, not being elevator men, desire to ship grain to Kansas City, Omaha, or Council Bluffs, for use there, or to markets beyond, without elevation at the places named, I think the arrangement is un-

lawful. The effort to prevent the extension of this and similar practices by admonition or advice will not prove effective. The sanction of this arrangement will prove the prolific excuse, if not the necessity, for the continuance and extension of similar devices fruitful of discrimination and friction on other lines of railway and at other places. To cut it out would cure a multitude of evils.

Lane, Commissioner, dissenting.

The somewhat complex Peavey interests herein involved I shall refer to as the Peavey company, and further, for the sake of simplicity, will take Omaha as a typical point. The problem presented may then be stated in this form: The Peavey Company, grain buyer and elevator owner, purchases grain at Country points, sends it over the Union Pacific Railroad to Omaha, where it is unloaded into the Peavey elevator. The Peavey Company pays the regular rate at Omaha, but the Union Pacific refunds 1¼ cents on each 100 pounds for unloading grain from the cars. Is the Union Pacific justified in giving this allowance to the Peavey elevator?

It was held by the Commission upon the original hearing that such an allowance, made under a special and secret contract between the Union Pacific and the Peavey Company, was legal.

A motion for a rehearing was made by certain in-
397 terested carriers but before this rehearing was had the Union Pacific filed a tariff extending this allowance to all elevators at Omaha, Kansas City and certain other points. Under this tariff the allowance is made to grain "transferred by elevators". The sole defense of the Union Pacific is that the grain is in transit, and that transfer in transit is recognized by law as a part of transportation which a railroad may provide for, either by facilities of its own, or by facilities which it otherwise procures.

I can justify as legal neither the Peavey contract nor the published tariff which extends the favor of the contract to a larger number of elevators. Both are discriminatory as against all shippers into Omaha, excepting those who own elevators and who, for their own purposes as grain dealers, ship the grain to Omaha and there handle it, treat it and sell it. That this is so seems to me evident from the simplest statement of the facts. The Peavey Company buys grain on the line of the Union Pacific, and takes out bill of lading, giving St. Louis as its destination. Why it takes such billing no one can explain. It receives no better rate by reason of following this procedure. The St. Louis billing is, in fact,

a sham. It serves no purpose save to give color to the pretense that the grain is on its way to St. Louis and is properly subject to transfer at Omaha. Mr. Monroe, traffic manager of the Union Pacific testified that his road handles the grain on a local way bill to Omaha, and that upon delivery at Omaha the through bill of lading is absolutely retired. Omaha is the destination of the grain; not its point of ultimate
398 consumption, perhaps, but its destination from an immediate transportation standpoint. Therefore, as it goes out of the possession of the railroad at Omaha and out of the control of any carrier, it seems to me conclusive that it is not transferred in transit.

If then the service rendered is not transfer in transit, what may that service be called which the elevators perform? The prevailing opinion answers this question by calling it elevation, which it defines as unloading grain from cars into a grain elevator, and loading it out again after a period of not to exceed ten days, which service, however, "like any other service offered by the carriers to shippers must be open to all on equal and reasonable terms". To this admirable definition I take no exception, but its applicability to the facts of this case is not altogether clear. Neither the provisions of the tariff nor of the contract conform to this definition. The effect of the majority opinion is to legalize the secret contract with the Peavey Company. This contract certainly had nothing to do with a service "open to all". Other elevators at certain Union Pacific termini are also now entitled to this unloading allowance, but the Union Pacific is none of its tariffs offers elevation to grain shippers. It owns no elevator at these points and it holds none under lease, nor does it have an arrangement with any elevator by which the farmer or the commission man or the independent buyer may secure elevation of his grain when carried over Union Pacific rails. All that the Union Pacific has agreed to do, under the fairest construction of its tariffs, is to give to those grain shippers who are fortun-
399 ate enough to control elevators at Omaha a refund of one and one quarter cents per hundred pounds for unloading their own grain. The railroad pays the elevator men for unloading his cars, and does not pay the commission man or the miller. This is not what I would designate as an offer of elevation "open to all on equal and reasonable terms". A carrier may certainly provide for unloading "if it does so for all shippers alike", but that is precisely what, in my opinion, the Union Pacific does not undertake to do.

The argument of the prevailing opinion may be thus illustrated: Armour buys a carload of dressed meat in the west and ships it to Omaha, where he places it in a refrigerator

awaiting further disposition. Most of this meat is destined to be consumed elsewhere, but he holds it in Omaha as a distributing point and for treatment. Is he entitled to an allowance for putting it into his refrigerator? Or perhaps a more perfect illustration would be the purchase of a trainload of oranges in California which are shipped into Omaha and there taken out of the cars by the owner, sorted, cleaned and graded, and, we will assume, shipped eventually to such other markets as he may determine. Should the owner of these oranges, which come over the Union Pacific, receive a refund of a certain amount for unloading the cars at Omaha?

If the Peavey Company bought this grain for shipment directly to St. Louis, and the railroad, for the purpose of relieving its equipment at Omaha, secured an elevator to make the transfer from its cars into those of another road, I would think it proper that the cost of such actual transfer should be borne by the road, or perhaps be divided between the two roads
400 interested, because the grain would be always within the control and possession of the carrier, and the service rendered would be but a transportation service to which all shippers were equally entitled. There are no such facts, however, presented in this case. The billing is confessedly false, the shipment is local, and the so-called transfer given is simply an incidental result of the ordinary prosecution of the grain dealer's business. No transportation service is rendered by the owner of the property. He does what he must do if he wishes the benefit of handling the grain—removes his grain from the car. The principle of this practice is wrong, no matter whether it extends to one elevator in a city or to all and no matter what the amount of the allowance may be. It gives a preference in rates to the elevator owner as against everyone else who wishes to ship grain into that market. It is a modern modification of an ancient rebating scheme.

Crockrell, Commissioner, did not participate in the hearing or in the decision of this case.

401 **Defendant's Exhibit 7.**

(Pages 315 and 316, Vol. XIV, Interstate Commerce Commission Reports.)

Allowances to Elevators by Union Pacific R. R. Co. 315.

No. 687.

In the Matter of Allowances to Elevators by the Union Pacific Railroad Company.

Submitted, May 22, 1908. Decided June 29, 1908.

Advantages that are unlawful may be employed in ways that do not involve the direct payment of rebates. An allowance by the Union Pacific Railroad Company to Peavey & Company, under the contract between them, when made on their own grain which has been mixed, treated, stored, weighed, or inspected in any elevator belonging to Peavey & Company, or which has been reshipped out of any of their elevators more than ten days after its receipt therein, amounts pro tanto to a contribution by the Union Pacific Railroad Company to Peavey & Company of the cost of securing the commercial benefits growing out of the mixing, treating, storing, weighing, or inspection of their grain, and is an undue preference and therefore unlawful.

C. A. Severance for the Receiver of the Chicago Great Western Railway Company.

Gardiner Lathrop and Robert Dunlap, for Atchison, Topeka & Santa Fe Railway Company.

Hale Holden, for Chicago, Burlington & Quincy Railway Company.

F. C. Dillard for Union Pacific Railroad Company.

Hagerman & Koon for Peavey & Company.

E. E. Williamson for Cincinnati Chamber of Commerce.

Henry S. Robbins for Chicago Board of Trade.

402 Report of the Commission on Rehearing.

Harlan, Commissioner,

The history of this proceeding and the facts shown of record are set forth in detail in the two opinions that have heretofore been announced by this Commission in 10 I. C. C. Rep., 309, and 12 I. C. C. Rep. 85. It will not be necessary therefore to make a further statement of facts. The matter has come on again for rehearing upon the petition of the Chicago Board of Trade, and upon numerous protests from other quarters, indicating an extension of the practice of making elevation allowances and alleging discriminations and other evils arising therefrom.

While adhering to the general principles expressed in the last report of the Commission in this proceeding, further reflection and further knowledge of the actual operation of the contract between Peavey & Company and the Union Pacific Railroad Company have led us to the conclusion that the reduction under our previous order of the allowance of 1¼ cents per hundred pounds to three-quarters of 1 cent does not reach

far enough, and has not sufficed to cure the evil of which complaint was made. That reduction was made on the theory that an allowance of 1¼ cents per hundred pounds was more than the cost to Peavey & Company of the service performed on their grain, and was therefore an unlawful rebate. But advantages that are unlawful may be enjoyed in ways that do not involve the direct payment of rebates. And we think that, Peavey & Company do enjoy in the actual operation of their contract advantages that do not accrue to other ship-
403 pers of grain. The mixing of grain is said to be one of the largest sources of profit to a grain dealer. By mixing a carload of inferior grain with a carload of grain of higher grade the agregate value of the 2 carloads is increased and the dealer's profits from the sale are larger than they would be if the 2 carloads were sold separately. The storage of grain beyond the elevation period of ten days is also of commercial value to grain dealers. The "treatment" of grain is of value to them in that it results in enhancing its value. Weighing and inspection are also of advantage to the owner of the grain. As was expressly stated in our last report, such services are commercial services and are in no sense a part of elevation as defined in the act to regulate commerce. If therefore the Union Pacific Railroad Company pays Peavey & Company an allowance of three-fourths of 1 cent, or of any other amount however small, on grain belonging to them which has been mixed, treated, stored, weighed or inspected in their elevators, it amounts pro tanto, to a contribution by the Union Pacific Railroad Company to Peavey & Company of the cost of securing these commercial results and benefits. The allowance therefore not only results in an undue preference when paid on grain belonging to the owner of an elevator thus under contract, but, in effect, is also an unlawful rebate, unless confined to grain that is reshipped within the elevation period of ten days and has not been mixed, treated, weighed or inspected.

No way has been suggested by which the Union Pacific Rail-
road Company may avail itself of the Peavey elevators
404 under the contract in question without giving to Peavey & Company and to their grain the commercial advantages alluded to, and these advantages we regard as an undue and unlawful preference. We therefore hold that the practice of the Union Pacific Railroad Company in paying to Peavey & Company an allowance under such circumstances upon their own grain is unlawful. An order will be entered in accordance with these views.

Prouty, Commissioner, concurs in the result; and Lane, Commissioner, concurs in the conclusion that the allowance is unlawful.

405 Defendant's Exhibit 8.

(Pages 317 to 332, inclusive, Vol. XIV. Interstate Commerce Commssion Reports.)

Traffic Bu. Merchants' Exchange v. C. B. & Q. R. R. Co. 317

No. 1239.

Traffic Bureau, Merchants' Exchange of St. Louis,

v.

Chicago, Burlington & Quincy Railroad Company.

No. 1240.
Same
v.
Missouri Pacific
Railway Company.

No. 1263
Same
v.
St. Louis & San Francisco
Railroad Company.

No. 1241
Same
v.
Chicago, Rock Island &
Pacific Railway Company.

No. 1267
Same
v.
Missouri, Kansas & Texas
Railway Company.

Submitted December 4, 1907. Decided June 29, 1908.

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1. A railroad company by granting a privilege which, although ostensibly open to the whole public, can, in the nature of things, only be taken advantage of by certain shippers, creates thereby a discrimination which may or may not be undue, according to the circumstances in each case.

2. The payment of an elevation allowance of three fourths of 1 cent per 100 pounds to elevators located upon the Missouri River is an undue and unlawful discrimination.

J. C. Lincoln, for Complainant.

Hale Holden and O. M. Spencer for Chicago, Burlington & Quincy Railroad Company.

E. B. Peirce for Chicago, Rock Island & Pacific Railway Company and St. Louis, & San Francisco Railroad Company.

406 A. G. Cochran and F. A. Cline for Missouri Pacific Railway Company.

J. M. Bryson for Missouri, Kansas & Texas Railway Company.

Report of the Commission.

Prouty, Commissioner.

The above cases all involve the same question and were heard together, the subject of controversy being the so-called elevator allowance or transfer charge paid by the defendants at the Missouri River. The petition is filed by the Traffic Bureau, Merchants' Exchange of St. Louis, an organization of the business interests of that city, and is in favor of the handlers of grain at that market. The exact point raised will be best understood by a brief statement of the manner in which grain is handled and an application of these methods to a particular shipment.

Grain in the states west of the Missouri River is usually bought in the country by the country elevator. In such case, the price of the grain is agreed upon and the grain is weighed and taken into the elevator, the transaction being thus completed so far as the farmer is concerned.

It sometimes happens that the farmer puts his grain on store in the elevator, subject to order for future shipment, and he also sometimes sells to what is known as the "track buyer", in which case the grain is delivered not into an elevator, but directly from the wagon into the car.

The owners of country elevators often have what are known as terminal elevators located at primary markets, into
407 which and through which they handle grain from their country houses, but it also happens that the country elevator has no such connection with any terminal elevator. In this event the grain is either sold f. o. b. the car at the country station or is shipped to some market to be disposed of. In either case it is usually sold upon the grade, inspection and weight of the market to which it is shipped. All grain shipped to a particular market to be sold and settled for according to the grade, inspection and the weight of that market must of necessity be elevated since it cannot, as a practical matter, be weighed in any other manner.

It will be seen, therefore, that in the ordinary course of business all grain must be elevated at the market upon which it is handled, excepting only such grain sold in the car for shipment beyond. This grain may be sold upon sample or it may be inspected and graded in the car. It can not be weighed, and the amount of the grain so dealt in is small. There is another and more important exception, viz, grain bought by the mill directly from the field.

The defendants, acting upon a decision of this Commission in the so-called Peavey case—In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., 12 I. C. C. Rep. 85—have established what they term a transfer charge, but what is ordinarily known among grain men as an elevator allowance at the Missouri River of three fourths of 1 cent per hundred pounds. The railway tariff provides that this payment shall be made to the elevator performing the service and not to the owner of the grain; but the testimony in the case before us shows that, as a practical matter, the operator of the
408 elevator at Missouri River points is almost without exception the owner of the grain, so that in fact the application of this tariff enables the grain owner at the Missouri River to obtain from the railroad company three fourths of 1 cent per 100 pounds upon all grain shipped by him into that market. The same result follows if the owner of the grain is not also the owner of an elevator, since the elevator which performs the service will give him the benefit of the three fourths of 1 cent which it obtains from the railroad company.

This allowance is treated upon the tariffs of the railroad companies as a transfer charge and is never paid unless the grain is shipped out of the elevator. In the case of the Union Pacific Company the charge is paid by that Company upon satisfactory evidence that the grain has gone forward. All other railroad companies operating west of the Missouri River have lines extending beyond that river to the east, and it is for the interest of those companies that the grain should be carried beyond over their own lines. The rails of the Chicago Great Western and certain other lines begin at the Missouri River, and unless the grain is elevated and sent forward from that market these lines receive none of the business. These competitive conditions compel the payment by all lines of the same allowance made by the Union Pacific, but the payment is made in all other instances by the out bound and not by the inbound carrier.

If, now, we apply the published tariffs of these defendants, including this elevation allowance or transfer charge,
409 to an actual movement of grain through an elevator at Omaha, as compared with a similar movement through an elevator at St. Louis, the dicrimination complained of becomes manifest. For this purpose we will assume a shipment from point A in Nebraska to the consumer at point B in Illinois. The rate from A to Omaha is ten cents, from the Missouri River to St. Louis nine cents, and from St. Louis or the Missouri River to B five cents.

If, now, the consumer at B should himself purchase a carload of grain at A, the cost of transporting that grain would be 24 cents per 100 pounds. In point of fact, the consumer at B seldom, if ever, buys in the country at A, but for various reasons which need not be stated he purchases of an intermediate grain man at some point like Omaha or St. Louis. We will assume first that the carload is handled through Omaha and that the grain dealer at Omaha owns and operates an elevator. The rate paid in this case as before, is 10 cents to Omaha, 9 cents to the Mississippi River, and 5 cents to B, making a through transportation charge of 24 cents; but the grain dealer at Omaha now receives from the railroad company an allowance of three-fourths of 1 cent. As between himself and the railroad, therefore, he has paid but 23¼ cents per 100 pounds.

Assume, now, that the shipment, instead of passing through the elevator at Omaha, is handled by a grain dealer who also owns and operates his own elevator at St. Louis. This dealer pays this same transportation charge, 10 cents to Omaha, 9 cents to St. Louis, and 5 cents to B, making
410 24 cents, and he receives nothing whatever from the railroad company.

It is perfectly evident that it costs the St. Louis grain dealer just three-fourths of 1 cent per 100 pounds more to lay this grain down at B than it costs the grain dealer at Omaha, if we assume that the expense of operating the elevator at Omaha and at St. Louis is the same.

In point of fact, the grain dealer at St. Louis does not usually own the elevator, but uses the public elevator, paying for this service one-half cent per bushel, or slightly more than three-fourths of 1 cent per 100 pounds, but the same result must follows if we assume that the grain dealer at Omaha, instead of owning and operating his elevator, procures the service from some other elevator, for in that case the railroad company would pay the elevator three-fourths of 1 cent per 100 pounds, and the elevator would perform the service without charge to the Omaha dealer.

In whatever way the matter is considered, it must be evident that the dealer upon the Missouri River has the advantage of the dealer at St. Louis by exactly the amount of this elevation charge, everything else being equal.

There can be no doubt upon the above facts that this elevation allowance works a discrimination against the market of St. Louis and in favor of the markets at various Missouri

River points where the allowance is made. The real question is whether that discrimination is undue, and therefore unlawful, and what, if so, the Commission can do to remove it.

The defendants all place their defense upon the ground that competitive conditions, not existing at St. Louis, force
411 the payment of this elevation allowance at the Missouri River. They assert that the Union Pacific, acting under the decision of the Commission in the Peavey case just referred to, pays at Omaha and at Kansas City this allowance of three fourths of 1 cent, and that other competing carriers are obliged to make the same allowance. Since there is no such competitive condition at St. Louis, they are not compelled to pay this charge and therefore decline to do so.

It is probably true that the payment of an allowance of this sort by one railroad at Omaha or Kansas City would force a similar payment by competing carriers, and this Commission has itself held that if a carrier pays this charge at Kansas City, it can not decline to pay it at Atchison. Atchison v. Missouri Pac. Ry. Co. et al., 12 I. C. C. Rep. 111. It may well be, therefore, that the action of the Union Pacific at Omaha and Kansas City does force the payment of this allowance at the Missouri River markets, and it becomes proper, therefore, in the light of the present record, to reexamine our decision in the Peavey case upon which these payments are justified by the defendants.

That proceeding was originally undertaken by the Commission upon its own motion, but in consequence of the suggestion of certain competing carriers. It had been alleged that the Union Pacific, under a secret contract with Peavey & Company, was paying to that company certain allowances for the unloading of grain, which amounted to a rebate in violation of the act to regulate commerce. The facts as developed in that investigation and upon which the Com-
412 mission based its decision were these:

The Union Pacific Railroad, in the operation of its lines which lead into and stop at Omaha and Kansas City, found it necessary to provide at these points warehouses into which grain shipped by them from the fields of Nebraska and Kansas could be unloaded so that their own cars might be released and promptly returned, and from which the grain could be loaded into cars of its connections when it went forward toward the east. Instead of erecting and operating such warehouses itself, it had entered into a contract with Peavey & Company by which that company provided these facilities. The Commission found, nor could there be any

doubt as to the accuracy of these findings, both from the testimony of the Union Pacific and of other carriers operating to the west of the Missouri River, that previous to 1899, when the contract was executed, and at that date, it was absolutely essential in the operation of the Union Pacific Railroad to provide such storage and transfer facilities at Omaha and in a less degree at Kansas City, and that the Union Pacific had entered into this contract with Peavey & Company in good faith and for the sole purpose, not of giving to Peavey & Company any undue or illegal preference, but of providing those facilities which it must otherwise have furnished for itself. We further found, and the testimony was not fairly doubtful upon this point, that the price specified in the contract of 1¼ cents per 100 pounds was not unreasonably high. Upon this statement of facts we held that the execution of the contract was legal and that the payments under the contract were not in violation of the act to regulate commerce.

413 It will be noted that the Commission treated this purely from the standpoint of the railroad as a storage and transfer proposition. The opinion points out that the contract is for the advantage of Peavey & Company, since in its actual workings the service of storage and transfer performed by that company for the Union Pacific Railroad was to a large extent one which Peavey & Company as grain dealers must perform for themselves, so that they were to this extent paid for the handling of their own grain. But the Commission called attention to the fact that the result of this advantage to Peavey & Company had not been sufficient to provoke protest from the competitors of that company, since not competing grain dealers but competing railways had brought the matter to the attention of the Commission and were present before the Commission urging that the contract be condemned. The last paragraph of the opinion of the Commission in the original case is as follows:

It is scarcely needful to add that arrangements of the kind investigated in this proceeding are not favorably regarded. When anything directly connected with the public service which a carrier is bound or undertakes to perform is farmed out, so to speak, to one of its own shippers, the relation thereby brought about is likely to excite distrust and to be looked upon with suspicion. The provisions of the regulating statute may not be violated because any resulting discrimination may not be undue, but the situation created can not be wholly satisfactory. Under existing conditions the transfer of grain

through elevators at various points seems to be a vir-
414 tual necessity both to the grain carrier and the grain dealer; but we are not unmindful of the fact that the persons to whom these elevator allowances are made appear to control a very large share of the grain business. As a practical matter this may be unavoidable, nor is it necessarily unlawful, but the methods adopted and now in vogue in this regard are liable to abuse and therefore not to be encouraged. In this case, however, we are persuaded, upon the facts disclosed and our view of the law, that no requirement of the act has been disregarded and that the respondent carrier is entitled to a dismissal of the complaint.

The whole case fairly shows that the Commission then realized that the operation of this contract might result in such discrimination in favor of Peavey & Company as would be undue and therefore unlawful, but were of the opinion that upon the record before us no such quality of undueness had been made to appear.

It should be further noted that this report of the Commission was promulgated before the decision of the Supreme Court of the United States in Interstate Commerce Commission v. Chespeake & Ohio Ry Co. 200, U. S., 361. While there could be no question as to the necessity of these transfer facilities at the time the contract was made, it was evident that they were much less needed when the case was heard, in 1903, so that there might have been some ground for claiming that while this contract was lawful when made it had become unlawful. But the Commission hesitated to say, even if that were true, that a contract which was not
only legal but apparently justifiable at the time of its
415 execution and upon the strength of which investments had been made could become illegal by change of conditions. That case holds apparently that whenever the execution of a contract violates the provisions of the act to regulate commerce the contract itself becomes void and its performance unlawful.

When the Peavey case came before the Commission the second time every condition in any sense controlling had changed. In the Matter of Allowances to Elevators by the Union Pacific Railroad Company, 12 I. C. C. Rep. 85.

While the Union Pacific as an operating company still found it desirable and at times, perhaps, necessary to have at Omaha elevators into which its cars could be unloaded, and thereby released, still its equipment then passed freely onto the lines of other railroads and the equipment of other rail-

roads moved freely over its lines. It appeared in the testimony that cars coming in from the field were frequently unloaded into the elevator and then loaded out for the east without being switched from the elevator. It also appeared that a great number of its cars coming into the elevator from the west were foreign equipment. Elevators had multiplied at Omaha, and the Union Pacific company, even if the Peavey elevator had not been in existence, would have found no occasion at the time of our last report, in April, 1907, to construct an elevator of its own at that point.

The change in the traffic situation was even more marked than that in operating conditions. In 1903 the rate from a point in Nebraska, where this grain originated,
416 through Omaha to some eastern market was less than the sum of the rates to Omaha and from Omaha. If the Union Pacific handled this business through Omaha, as it must, it was necessary to do so upon a joint through rate and as a strictly through proposition. It was, therefore, in fact as well as in theory necessary that it should in some way provide for the transfer of the grain from its cars to the cars of its connections. In 1906 this was not so. After a period of warfare the Chicago Great Western had secured the adoption at Omaha of the same system of rate-making which had long prevailed at Kansas City, so that the combination upon Omaha was the same as the through rate via Omaha or via any point across the Missouri River around Omaha. Commercially it was certain that the grain would subsequently go forward for the most part to some other destination, for the consumption at Omaha was small in comparison with the total receipts, but from a transportation viewpoint the service was a strictly local one upon a local bill of lading and under a local rate. The Union Pacific neither knew nor cared what the subsequent destination of the grain was. Hence the interest of that company in the transaction had changed. Before it had been essential that this grain should be brought to Omaha upon a through rate and sent forward upon that rate. Now it was only essential that it should be marketed at Omaha. Conditions must be so adjusted as to make it desirable for the owner to ship his grain into Omaha rather than to ship it via some other line around Omaha; and these conditions were met when Omaha became a grain market—in other words when the grain was elevated by the owner at Omaha.

417 For the purpose of accomplishing this end the Union Pacific Company had extended its payment of this 1¼ cents to all elevators at Omaha or Council Bluffs which per-

formed this service. In other words, it now made payment of this sum not by virtue of any contract with Peavey & Company, but in the adoption of a policy which would secure the handling of the grain at that point.

While the case presented upon the second record was entirely different from that presented upon the first and must be disposed of on entirely different considerations, it still seemed to a majority of the Commission that the payment of these allowances ought, under the circumstances to be permitted. The reasons which moved the writer of this report to that opinion are not fully stated in the report then published, and may be briefly given here.

It is evident that the discrimination arising out of the payment of such an allowance might be of several different kinds, and for the purpose of defining these varieties of preference we may take the concrete case of a payment to Peavey & Company.

(a) That company might derive an advantage from the fact that the amount paid for the service was greater than the cost of the service itself. If they received more than the expense to them, they would manifestly obtain an advantage over a competitor who did not perform the service by exactly the amount of difference between the sum paid and the cost to them.

Now, when we reduce the charge from 1¼cents to three-
fourths of 1 cent per 100 pounds it seemed reasonably
418 certain that we had eliminated that source of discrimination, if it ever existed, since the evidence in the Peavey case, as well as in other cases before the Commission, strongly tends to show that the fair cost of performing this service equals or exceeds the latter sum. It should be added, however, that information coming to the Commission since indicates that even three-fourths of 1 cent may be too high.

(b) There is an entirely different discrimination arising from the fact that Peavey & Company as grain dealers must have these facilities of elevation; that the service which they perform for the railroad company also involves a service necessary to themselves as grain handlers, and that therefore the railroad pays them for a service in connection with their own grain, which their competitor must furnish at his own cost. This is perfectly seen by assuming that some elevator is located upon the line of the Union Pacific at Omaha or Council Bluffs which does not receive the allowance.

It must be kept in mind that this elevator service is absolutely essential to the business of Peavey & Company. They

could not transact a grain business at Omaha without it. The evidence shows that practically all the grain handled into the elevator is their own; hence the service which they perform in storing and transferring this grain for the Union Pacific differs in no respect from the service which they would perform, except in rare instances, if they were not operating under this contract.

The competitor of Peavey & Company also owns a line of country houses upon the Union Pacific with a terminal
419 elevator located at Omaha and performs for the Union Pacific in the handling of its business exactly the same service as does Peavey & Company, at substantially the same expense, yet Peavey & Company are paid 1¼ cents per 100 pounds while their competitor receives nothing at all. This allowance, as we have already seen, is often more than the entire profit from the handling of the grain; hence, as a practical matter, there arises in the working out of this contract a discrimination in favor of Peavey & Company as against other elevators at Omaha.

Now, when the Union Pacific Company extended the payment of this elevator allowance to all elevators in Omaha it thereby removed this second form of discrimination. The competitor of Peavey & Company at Omaha or Council Bluffs would now receive exactly as much as was paid to that company under its contract, and hence payment under that contract no longer worked discrimination between the owners of elevators. Under our second holding, as applied to conditions then existing, neither the first nor the second form of discrimination could exist.

(c) A third discrimination still remains. While this is termed a transfer charge upon the tariff and is only paid upon grain which actually moves out from Omaha, it is, in fact, under actual conditions, an elevator allowance, and is paid by the Union Pacific for the purpose of inducing the elevation of grain at Omaha. In other words, the Union Pacific pays for the unloading of a carload of grain when discharged into an elevator and requires the consignee to pay for the unloading if that grain is unloaded by any other means. This is a clear discrimination in favor of the elevator against the consignee who does not employ the service of an elevator
420 in the unloading of his grain.

It sometimes happens that grain is sold for shipment beyond, without being unloaded at Omaha. This business is transacted by a commission man who comes into competition with the dealer operating through the elevator, and generally

the owner of the elevator. Here is a plain preference in favor of the elevator and against the shipper who has no occasion to employ that facility. The same discrimination would arise against a shipper who, though desiring to use an elevator, did not wish to use it at Omaha.

The existence of this form of discrimination was clearly apparent upon the hearing and is prominently referred to in the reports of both dissenting Commissioners. It did not seem to the writer at that time a sufficient ground for holding the payment of these allowances to be unlawful. Railways cannot be operated without more or less discrimination. The act to regulate commerce does not attempt to prohibit all discrimination, but only that which is undue. It was the opinion of the writer that under all the circumstances this discrimination ought not to be held undue, for the following reasons, among others:

Elevation facilities are absolutely essential to the proper handling of grain. There must be the country elevator and the terminal elevator; and it is for the interest of all parties,—producer, carrier and consumer—that these facilities shall be ample. In no other way can the farmer dispose of his product and obtain his money for it when he desires.

421 In no other way can the railroad economically handle this grain from the producer to its final destination. In the interest of the general public, therefore, the construction of ample elevator capacity should be in all proper ways encouraged.

The Union Pacific has a special and peculiar interest in the existence of extensive elevator facilities at Omaha. As repeatedly said, its eastern terminus is here. Its haul of grain from the country station is comparatively short. If its cars can be promptly unloaded and promptly returned to the field this grain can be moved by it when desired. Otherwise, if its equipment goes beyond its own lines, delays and congestion may occur. It is perfectly plain that, looking at this matter from a purely operating standpoint, the interests of the Union Pacific demand ample storage facilities at Omaha and Council Bluffs, into which grain can be temporarily put when operating conditions are such that it can not be sent through to some more distant point.

This is true in the case of the Union Pacific, not only from the operating but also from a competitive standpoint. That company can not handle grain into Omaha from the field in competition with lines leading through Omaha unless the grain can move by its line to its final destination with the same con-

venience that it moves by other lines; and this can only be true when the grain is brought into the Missouri River and unloaded at that point. The traffic situation, therefore, of the Union Pacific demands that it shall encourage a system of handling this grain which involves the unloading of the
422 grain both by itself and its competitors at the Missouri River.

The same thing is true, viewed as an outgoing proposition, from the standpoint of a railway, like the Chicago Great Western, whose western terminus is at Omaha. Grain brought to Omaha goes almost entirely to some point of consumption east. If the Chicago Great Western is to obtain a part of this competitive business it must do so by taking it from the elevators at Omaha. It cannot be expected that these through lines, operating both east and west of the Missouri River, will bring the traffic to Omaha and there deliver it to the Great Western. Competitive conditions, therefore, imperatively require the Chicago Great Western to promote such traffic and commercial conditions as will enable it to secure a portion of this business; in other words, it must bring it about that this grain is elevated and reloaded at the Missouri River.

The purpose of the Union Pacific is not served by reducing the rate into Omaha, for that is met by every other line; nor is the purpose of the Great Western accomplished by making a lower rate from Omaha which must be made by all lines. What these companies desire is the unloading and reloading of this grain at Omaha, and this can only be accomplished by promoting in some way the building and operation of elevators at that point.

Now, it seems to the writer that the Union Pacific in the just conservation of its interests, that the Chicago Great Western in the legitimate development of its business, might make this elevation allowance at Omaha, and therefore that the discrimination caused by the payment of this allowance ought
423 not to be pronounced undue.

There was still another consideration of some weight. About the only competition between carriers in the transportation of grain had arisen in respect of these elevation allowances. The payment of such allowances amounts to a reduction in the rate which must finally inure to the benefit of the producer and the consumer. To cut out this allowance and all similar allowances and privileges would be to increase in effect by a very large sum in the aggregate the transportation charges of this country, and we might well hesitate to do this unless it were found absolutely necessary.

In the light of what has transpired since our decision, and as a result of that decision, and in view of what must inevitably happen if we adhere to it and apply it, we are constrained to now hold that this elevation allowance is an undue discrimination which should be prohibited.

It long since became clear that the public had nothing to gain in the way of transportation charges from our recognition of the propriety of these payments. Soon after the submission of the Peavey case the last time, carriers operating from the Missouri River, becoming convinced that the Commission would sustain the legality of the Peavey contract, and realizing that they must therefore establish similar allowances, advanced their rates 1 1-4 cents per 100 pounds upon the theory apparently that the elevation allowance would equal that amount. When the Commission published its opinion allowing three fourths of 1 cent per 100 pounds, the carriers promptly put in elevation to that extent. The net result
424 to the public was therefore a loss of one half cent per 100 pounds, and the shipper is still poorer by that amount.

It has also become perfectly apparent that whatever may have been true when the Peavey contract was entered into, or when the original hearing in that case was had, or even at the time of the second report, this payment is no longer in any sense intended to cover the expense of a transfer. It is an elevator allowance, pure and simple, made to the owner of the grain if he elevates that grain upon the Missouri River, and for the purpose of persuading him to elevate it at that point. While paid nominally to the elevator, it turned out in testimony in the present case that practically without exception the operator of the elevator into which the grain was unloaded was the owner of the grain itself. If a case should arise where the owner of the grain was not also operator of the elevator, he might still, if he required this elevator service, obtain it for nothing, since the elevator would give him the service upon receiving from the railroad company the three fourths of 1 cent.

The traffic representatives of these defendants all testified that they paid this sum, not as a transfer charge, not because they had occasion to use a transfer, but because they were compelled by competitive conditions.

This is now regarded by the shipper as an elevator allowance. It is paid by the ralway as an elevator allowance, and we must regard, when disposing of this question, not the circumstances under which the practice may have originated, but the facts

as they now exist. What does not seem to have been
425 clearly apprehended in the former discussions of this subject is the importance of this allowance, the extent to which it would be felt, and the impossibility of controlling it any other way than by prohibiting entirely such payments. Nothing can more clearly show this than the cases which are now pending before this Commission.

Take the facts disclosed by the present record. For years these defendant carriers have maintained a certain relation in rates from the fields of production west of the Missouri River to Kansas City and St. Louis. The rate from the field to St. Louis has been the local to the Missouri River plus the local from the Missouri River to St. Louis. Under this adjustment of rates it has been possible to move grain through either the markets at the Missouri River or St. Louis to eastern destinations upon the same terms as to cost of transportation. Today this relation has been altered. Grain can be moved to eastern points for three fourths of 1 cent per 100 pounds less through Kansas City than through St. Louis. This is plainly unjust and should be corrected. Why not remove this discrimination by commanding the defendants to make the same allowance at St. Louis as at Kansas City?

At the present time grain destined for certain parts of Texas and for certain portions of the south receives at St. Louis an elevation allowance of three fourths of 1 cent per 100 pounds. By tariff becoming effective since the hearing, lines leading east from St. Louis now allow an elevation fee of one fourth of one cent per bushel on outbound shipments.
If, therefore, these defendants are required to pay
426 three fourths of 1 cent allowance at St. Louis, that market will thereby acquire an advantage over the Missouri River. Could we, in order to avoid this result, say that the defendants need not pay an allowance at St. Louis so long as lines leading out did so; or that the allowances made by them at St. Louis should not be the same as that paid upon the Missouri River, but only sufficient to equalize conditions at these two markets? Could we hold that so long as the Baltimore & Ohio granted the allowance from St. Louis the Missouri Pacific need not apply it to inbound shipments; but that should the Baltimore & Ohio at any time withdraw its tariff upon the outbound shipment, then the Missouri Pacific must apply its allowance upon the inbound?

Consider the mill located at B, in Illinois, to which the shipment from A, in our original illustration, was supposed to be made. Assume that the miller, instead of buying his grain from the elevator at St. Louis or at Omaha, elects to go into

the field and purchase from the farmer. Is there any reason why this shipper should pay more for a less service than the grain dealer at Omaha, simply because the miller does not require and cannot use elevation at that market?

Consider the mill located at Omaha itself. What imaginable reason is there why grain should be taken to an elevator in Omaha and unloaded at three fourths of 1 cent per 100 pounds less than it will be taken to the mill and unloaded, when every physical incident of the two transactions is the same.

427 The effect of these allowances upon the milling industry is more clearly seen by reference to the mills located west of the Missouri River. There are, for example, large milling interests in southern Kansas, and these mills buy directly from the field. In the past they have competed with mills east of the Missouri River which have bought their grain through elevators located at those markets. Today all these mills to the east of that river enjoy the benefit of free elevation, or of an elevation allowance which is equivalent to free elevation, and which is three fourths of 1 cent per 100 pounds. As compared with a year ago these mills to the east of the Missouri River have acquired an advantage in the purchase of their raw material over the Kansas mills, which buy directly from the producer, of three fourths of one cent per one hundred pounds.

The Commission now has before it a complaint from a company operating a terminal elevator some 40 miles west of the Missouri River. This company sells grain which passes through this elevator in competition with grain elevated at the Missouri River. The evidence clearly shows that without this allowance this concern must go out of business at that point. This allowance must extend, therefore, not only to the east but to the west.

It is said that we ought not to prohibit the payment of these allowances for the reason that we cannot prevent the granting of free elevation, and that to prohibit the allowance by railways not owning elevators while their competitors who do operate elevators can grant to their shippers free elevation would be unjust. If it be true in fact that that free
428 elevation cannot be prevented, we should certainly hesitate to attempt to prohibit the payment of the allowance. If the Great Western railway owning, as it does, an elevator at Omaha, can give free elevation, every other line must also construct and own an elevator at this point. The business of elevation would be entirely done by railroad ele-

vators, and every private establishment of that kind would be virtually confiscated.

But we do not by any means concede that free elevation can not be prohibited. Upon the contrary, there is no difference in principle between the giving of the service and the giving of the money with which to buy the service, and we have no doubt that this Commission has the same jurisdiction to prohibit the granting of the free service which it has to prohibit the payment of the allowance.

It is without doubt the right of the Union Pacific Company to provide at Omaha storage facilities into which its cars can be unloaded and thereby promptly released. That company may without question provide for the transfer of grain from its own cars to the cars of its connection when that is necessary to complete a through shipment. It can provide these facilities either by an outlay upon its own part, or by contracting for the performance of the service at so much per bushel. This service pertains entirely to the transportation of the grain. The shipper has no possible interest in it, and it is entirely immaterial to him by what means that is effected, provided the service of transportation can be properly performed.

If, however, the Union Pacific Company gives to the
429 shipper over its line the privilege of securing for nothing an official weight and inspection of his carload of grain; if it issues to him a certificate by which it agrees to hold a certain amount of grain of a certain grade at the pleasure of the shipper and send that grain forward to whatever destination the shipper names, an entirely new element is introduced into the transaction. This is not an incident of transportation, nor is it performed for the benefit of the carrier. It is a part of the grain dealer's business, is for his benefit, and is of value to him. If it is accorded to one dealer and not to another, a preference in favor of the dealer who receives it arises. This service the railroad company has no right to render free when this works an undue discrimination against other shippers.

It is true that this service costs the railroad company but little and is of much greater value to the shipper who receives it. This goes to the convenience and not to the quality of the transaction. It may be in the interest of economy that the carrier should render this service for the shipper. We do not now hold that commercial elevation may not properly be furnished by a railroad, but we do hold that such elevation must be charged for at what it is reasonably worth.

We hold that a railroad company by extending a privilege of value to one member of the shipping public, when that privilege in the nature of things is not desired and cannot be used by other members of the public, is thereby guilty of a discrimination in favor of the one who can and does use the privilege. This discrimination may or may not be undue
430 according to the circumstances of each case. In the great majority of instances such discriminations are not in fact unlawful. But upon the facts now before us the granting of free commercial elevation or the payment of an elevation allowance must be held an undue discrimination and therefore unlawful. Such an allowance by the Union Pacific at Omaha is not open to the whole public but only to those members of the public who have occasion to use an elevator at Omaha.

The defendants in this case will be ordered to cease and desist from such payments at Kansas City and other Missouri River points. In order that sufficient time may be allowed to prevent any disturbance of business conditions this order will not take effect until October 1st, and the tariffs of the defendants withdrawing the allowance must be filed upon thirty days notice.

Harlan, Commissioner, concurring:

I concur in the disposition made by the Commission of these complaints but not in all the inferences that may be drawn from what is said in the opinion. I am not willing to be understood as entertaining the view that a railroad company may not exercise its own discretion in providing necessary facilities for the conduct of its transportation and the management of its terminals and equipments; and may not for that purpose provide elevation for its grain shipments free of charge. As that term is used in the act I understand it to mean substantially a transfer of the grain from the car of an inbound carrier through an elevator to the car of the
431 outbound carrier within a period of ten days. And in such elevation I see nothing either preferential or discriminatory whether done in an elevator operated by the carrier or in an elevator operated for it by the owner. But I agree that any allowance by the carrier to the owner of an elevator on grain belonging to him that has been weighed, inspected, cleaned, mixed, or otherwise treated in the process of elevation is unlawful. As a facility for the convenience of the carrier free elevation is unobjectionable; but when the owner is permitted to and does use the elevation as a transit privilege for himself by means of which to secure commercial advantages on his own grain, the result is an unlawful prefer-

ence and discrimination. This is expressly so stated in the proceeding entitled In the Matter of Allowances to Elevators by the Union Pacific R. R. Co., ante. p. 315, and in substance, in the opinion of the Commission in the same case reported in 12 I. C. C. Rep. at p. 85.

I am requested by Commissioner Clark to say that he concurs in this view.

432

Plffs' Ex. 4, C. W. P.

UNION PACIFIC RAILROAD COMPANY.

Statement of Vouchers covering elevation charges, in favor of the Omaha Elevator Co. presented and paid during the period June 26, 1906, to December 31, 1907.

Voucher Date	Voucher Audit No.	Amount	Date Paid	No. of cars eliminated account not released within 48 hours as provided in Tariff.
1907.				
			1907	
May 7	E 164950	15,561.89	May 9	19
June 10	E 167229	1,453.20	June 21	..
June 12	E 167227	2,423.43	June 21	..
June 14	E 167489	5,875.99	June 21	7
June 27	E 167894	1,374.59	July 2	..
Aug. 8	E 170840	1,355.74	Aug. 26	..
Aug. 9	E 170850	1,924.89	Aug. 26	..
Aug. 5	E 170838	322.66	Aug. 26	..
Sept. 5	E 172609	557.71	Sept. 23	..
Sept. 30	E 173625	14.37	Oct. 16.	..
Total		30,864.47		26

Omaha, Nebraska, May 13, 1909.

W. H. ANDERSON,
Auditor of Freight Accounts.

433

Plffs' Ex. 5, C. W. P.

UNION PACIFIC RAILROAD COMPANY.

Statement of Vouchers covering elevation charges, in favor of the Trans-Mississippi Grain Co. presented and paid during the period June 26, 1906, to December 31, 1907.

Date	Voucher Audit No.	Amount	Date Paid	No. of cars eliminated account not released within 48 hours as provided in Tariff.
1907			1907	
May 8	E 164952	10,315.91	May 9	2
June 21	E 167480	683.19	June 27	4
June 24	E 167612	494.75	June 27	2
July 1	E 168680	1,144.19	July 17	1
July 2	E 168836	222.96	July 17	..
June 22	E 167610	1,186.16	June 27	..
June 22	E 167622	126.49	June 27	..
Aug. 10	E 170906	981.94	Aug. 26	..
Sept. 30	E 173621	340.88	Oct. 16	..
Oct. 1	E 173623	367.36	Oct. 16	..
Dec. 4	E 177893	1,260.63	Dec. 21	3
Total		17,124.46		12

Omaha, Nebraska, May 13, 1909.

W. H. ANDERSON,
Auditor of Freight Accounts.

434 It is hereby stipulated that the foregoing bill of Exceptions, with exhibits attached and filed herewith, is a correct Transcript of all the evidence adduced upon the trial of this cause.

SMYTH & SMITH,
Attorneys for Plaintiffs.

EDSON RICH,
Attorney for Defendant.

Dated at Omaha, Nebraska 6-26-1909.

435 It is hereby stipulated and agreed by and between The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation and the Crowell Lumber & Grain Company, plaintiffs herein, and Union Pacific Railroad Company, defendant herein, that the foregoing Bill of Exceptions contains all of the evidence given or offered on the trial of the case of The Updike Grain Company, the Nebraska-Iowa Grain Company and the Crowell Lumber & Grain Company, plaintiffs, vs. Union Pacific Railroad Company, defend-

ant, tried in the Circuit Court of the United States for the District of Nebraska, Omaha Division, and correctly shows the proceedings had on said trial; and that said Bill of Exceptions is correct in all respects, and that the same may be signed, settled, allowed, and made a part of the record in said cause, by Honorable William H. Munger, the Judge who presided at the trial of said cause, without further notice to the plaintiffs or either of them, or their counsel.

SMYTH & SMITH,
Attorneys for Plaintiffs.

EDSON RICH,
Attorney for Defendant.

Dated at Omaha, Nebraska, 6/26, 1909.

436 Now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled and allowed, signed and certified by the Court, and made a part of the record in the cause, as provided by law.

EDSON RICH,
Attorney for Defendant.

Dated at Omaha, Nebraska 6/26, 1909.

The foregoing Bill of Exceptions contains all the evidence given or offered on the trial of the cause of The Updike Grain Company, the Nebraska-Iowa Grain Company and the Crowell Lumber & Grain Company Plaintiffs, vs. Union Pacific Railroad Company, Defendant, and correctly shows the proceedings on said trial; and said Bill of Exceptions is correct in all respects, and is hereby approved, allowed and settled, and made a part of the record herein.

W. H. MUNGER,
Judge Presiding at said trial.

Dated at Omaha, Nebraska, June 26th, 1909.

Endorsed: Filed Jun. 28, 1909. Geo. H. Thummel, Clerk.

437 Thereupon afterwards, to-wit:—On the 28th day of June, 1909, Assignment of Errors was filed in said case, which said Assignment of Errors is in words and figures following, to-wit:—

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants,

v.

The Union Pacific Railroad Company, Defendants.

Assignment of Errors.

Now on this 25th day of June, A. D. 1909, comes the defendant, Union Pacific Railroad Company, by its attorney, Edson Rich, and says that there is manifest error in the record proceedings and judgment in the above entitled cause, and that the judgment is erroneous and against the just rights of the said defendant for the following reasons, to-wit:

1st: The verdict is not sustained by sufficient evidence.

2nd: The verdict is contrary to law.

3rd: Errors of law occurring at the trial and duly excepted to at the time.

4th: The Court erred in overruling the defendant's objection to the introduction of any evidence on the part of the plaintiffs on the ground that the petition failed to state a cause of action against the defendant, to which ruling of the court the defendant at the time duly excepted.

5th: The Court erred in overruling the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the several plaintiffs, to which ruling of the Court the defendant at the time duly excepted.

438 6th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant, and against The Updike Grain Company, to which ruling of the Court the defendant at the time duly excepted.

7th: The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiff's testimony, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the Court the defendant at the time duly excepted.

8th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiff's testimony, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the Court the defendant at the time duly excepted.

9th: The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the plaintiffs.

10th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant, and against the Updike Grain Company, to which ruling of the Court the defendant at the time duly excepted.

11th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the Court the defendant at the time duly excepted.

439 12th: The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the Court the defendant at the time duly excepted.

13th. The court erred in sustaining the motion made by the plaintiffs, at the close of all the testimony in the case, to direct a verdict in favor of the plaintiffs and against the defendant, to which ruling of the Court the defendant at the time duly excepted.

14th: The Court erred in directing the jury to find a verdict in fabor of the Nebraska-Iowa Grain Company for the sum of $2,509.74, with interest from July 22, 1907, to which action of the Court the defendant at the time duly excepted.

15th: The Court erred in directing the jury to find a verdict in favor of the Crowell Lumber & Grain Company for $698,-29 with interest from December 26, 1907, to which action of the Court the defendant at the time duly excepted.

16th. The Court erred in directing the jury to find a verdict in favor of the Updike Grain Company for $6742.10, with interest from July 1st, 1907, to which action of the court the defendant at the time duly excepted.

17th. The Court separately erred in directing the jury to return a verdict in favor of each of the plaintiffs, the Nebraska-Iowa Grain Company, the Crowell Lumber & Grain Company, and the Updike Grain Company, to which action of the Court the defendant at the time duly excepted.

18th. The court erred in rendering, ordering and entering judgment in favor of the Nebraska-Iowa Grain Company.

19th. The Court erred in ordering, rendering and entering judgment in favor of the Crowell Lumber & Grain Company.

440 20th. The court erred in ordering, rendering and entering judgment in favor of the Updike Grain Company.

21st. The court erred in instructing the jury in the following words:

"I will cut this matter short and say to you, Gentlemen of the Jury, that the Court will relieve you of responsibility in the matter, so that you need not have any compunctions of conscience, and will direct you to return a verdict for the Nebraska-Iowa Grain Company in the sum of $2,509.74, with interest from July 22, 1907; and in favor of the Crowell Lumber and Grain Company find a verdict in their favor for $698.29, with interest from December 26, 1907, and in the case of The Updike Grain Company for $6742.10, with interest from July 1st, 1907,"

to the giving of which instruction the defendant duly excepted at the time and in the presence of the jury.

22nd. The Court erred in overruling the motion for a new trial filed by the defendant herein.

Wherefore the Union Pacific Railroad Company, Plaintiff in Error, Defendant below, prays that the judgment of the Circuit Court of the United States for the District of Nebraska, be reversed and that the said court be directed to grant a new trial of said cause.

EDSON RICH, JOHN A. SHEEAN,
Attorneys for Plaintiff in Error,
Defendant below.

Endorsed: Filed Jun 28, 1909, Geo. H. Thummel, Clerk.

441 Thereupon, afterwards, to-wit:—On the 28th day of June, 1909, Petition for Writ of Error was filed in said case, which said Petition is in words and figures following to-wit:

In the Circuit Court of the United States within and for the District of Nebraska. Omaha Division.

The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation, and the Crowell

Lumber & Grain Company, a corporation, Complainants,

v.

The Union Pacific Railroad Company, Defendant.

Petition for Writ of Error.

Union Pacific Railroad Company, defendant in the above entitled cause, feeling itself aggrieved by the verdict of the jury and the judgment entered on the 14 day of May, 1909, comes now by Edson Rich, its attorney, and petitions the said Court for an order allowing said defendant to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit under and according to the laws of the United States, in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit. And your petitioner will ever pray.

EDSON RICH, Attorney for Defendant.

Endorsed:—Filed Jun 28, 1909, Geo. H. Thummel, Clerk.

442 Thereupon afterwards, to-wit:—At the April 1909 Term of said Court and on the 28th day of June, 1909, the following Order Allowing Writ of Error was signed and filed in said cause, and duly entered of record in Journal No. "7" of the proceedings of said Court, to-wit:

The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants,

v.

The Union Pacific Railroad Company, Defendant.

Order Allowing Writ of Error.

Upon motion of Edson Rich, Attorney for Defendant, and upon filing a petition for a writ of error and an assignment of errors, it is

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered here-

in, and that the amount of bond on said writ of error be, and hereby is fixed at $13,000.00.

W. H. MUNGER,
Judge of the District Court of the United States within and for the District of Nebraska, Omaha Division.

Endorsed:—Filed Jun 28, 1909, Geo. H. Thummel Clerk.

443 Thereupon afterwards, to-wit:—On the 28th day of June, 1909, Supersedeas Bond was filed in said case, which said Supersedeas Bond is in words and figures following, to-wit:—

Supersedeas Bond.

Know all Men by These Presents:

That we, Union Pacific Railroad Company, as principal, and Frank T. Hamilton, as surety, are held and firmly bound unto The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, and each of them in the full and just sum of $13,000.00, to be to the said The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, their successors or assigns, well and truly paid, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns jointly and severally by these presents.

Sealed with our seals and dated this 28th day of June, 1909.

Whereas, lately at the April term of the Circuit Court of the United States within and for the District of Nebraska, Omaha Division, in a suit pending in the said court wherein The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company were complainants, and Union Pacific Railroad Company was defendant, a judgment was rendered against the said defendant, and the said defendant has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, citing and admonishing them to be and appear in the Circuit Court of Appeals of the United States for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of the said citation:

444 Now, the condition of the above obligation is such that if the defendant, Union Pacific Railroad Company, shall prosecute said writ of error to effect and shall answer all damages, charges and costs if it fail to make good its plea, then the above obligation to be void, else to remain in full force and effect.

UNION PACIFIC RAILROAD COMPANY,
Principal.
By Edson Rich, Its Attorney.

FRANK T. HAMILTON, Surety.

Approved by

W. H. MUNGER,
Judge of the District Court of the United States within and for the District of Nebraska, Omaha Division.

Endorsed: Filed Jun 28, 1909. Geo. H. Thummel, Clerk.

445 Thereupon afterwards, to-wit:— On the 28th day of June, 1909, a Writ of Error was allowed in said case, and a Citation duly signed, and returned and filed on the 29th day of June, 1909, with acceptance of service endorsed thereon, the following of which are the originals:

446 In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division.

The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, Complainants,
vs.
The Union Pacific Railroad Company, Defendant.

Writ of Error.

United States of America:—ss.

The President of the United States of America,

To the Honorable Judges of the Circuit Court of the United States for the District of Nebraska, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea, which is in the said Circuit Court before you, at the April Term, 1909, thereof, between The Updike Grain Company, a corporation, the Nebraska-Iowa Grain Company, a

corporation, and the Crowell Lumber & Grain Company, a corporation, plaintiffs in the court below, and Union Pacific Railroad Company, defendant below, a manifest error hath happened, to the great damage of the said Union Pacific Railroad Company, as by its complaint appears.

We being willing that error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have said records and the proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit on or before
447 the 27 day of August, 1909, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 28 day of June, in the year of our Lord, one thousand nine hundred and nine.

Seal
U. S. Circuit Court,
Dist. of Nebraska.

Issued at office in Omaha, Nebraska, with the seal of the Circuit Court of the United States for the District of Nebraska, and dated as aforesaid.

GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska.

Allowed by W. H. Munger, Judge.

448 United States of America,
District of Nebraska—ss.

In obedience to the command of the within writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

Seal
U. S. Circuit Court,
Dist. of Nebraska,
Omaha Division.

In Witness Whereof I hereto subscribe my name and affix the seal of the Circuit Court of the United States for the District of Nebraska, Omaha Division, this 23rd day of August, 1909.

GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska, Omaha Division.

161 Y

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division. No. 161, Doc. Y. The Updike Grain Company, a corporation, et al, Complainants v. Union Pacific Railroad Company, Defendant. Writ of Error Filed Jun. 28, 1909, A. D. Geo. H. Thummel, Clerk.

449 United States of America to the Updike Grain Company, The Nebraska-Iowa Grain Company, and the Crowell Lumber & Grain Company, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Nebraska, Omaha Division, wherein Union Pacific Railroad Company is Plaintiff in Error, and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. H. Munger, Judge of the District Court of the United States for the District of Nebraska, this 28 day of June, 1909.

W. H. MUNGER,
Judge of the District Court of the United States, within and for the District of Nebraska, Omaha Division.

Service of the within citation hereby accepted this 29 day of June, 1909.

THE UPDIKE GRAIN COMPANY,
CROWELL LUMBER & GRAIN COMPANY,
NEBRASKA-IOWA GRAIN COMPANY,
By Smyth & Smith, their Attorneys.

161 Y.

In the Circuit Court of the United States within and for the District of Nebraska, Omaha Division. No. 161, Doc. Y. The Updike Grain Company, a corporation et al., Complainants v. Union Pacific Railroad Company, Defendant. Citation. Filed Jun. 29, 1909, A. D. Geo. H. Thummel, Clerk.

450 Thereupon afterwards, to-wit: On the 23rd day of July, 1909, Praecipe for Transcript was filed in said

case, which said Praecipe is in words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska, Omaha Division.

The Updike Grain Company, et al.
vs.
Union Pacific Railroad Company.

Praecipe for Transcript.

To the Clerk of said Court:

Please prepare Transcript for the United States Circuit Court of Appeals in the above entitled cause, and include therein the following:

1. Petition.
2. Motion to make petition more specific.
3. Answer.
4. Order, Leave given to file Reply. Jury empanelled.
5. Reply.
6. Order, Trial proceeds.
7. Order, Verdict and judgment.
8. Order, Leave to file motion for new trial, etc.
9. Motion for new Trial.
10. Motion for Attorneys' fee.
11. Order, Motion for new trial overruled, etc.
12. Bill of Exceptions.
13. Assignment of Error.
14. Petition for Writ of Error.
15. Order Allowing Writs of Error.
16. Supersedeas Bond.
17. Writ of Error.
18. Citation.
19. Praecipe for Transcript.

20. Certificate of Clerk.

Dated this 23 day of July, A. D. 1909.

EDSON RICH,
Attorney for Defendant.

Endorsed: Filed Jul. 23, 1909. Geo. H. Thummel, Clerk.

451 Thereupon afterwards, to-wit: On the 10th day of August, 1909, Stipulation in re Record for Circuit Court of Appeals, was filed in said case, which said Stipulation is in words and figures following, to-wit:

In the Circuit Court of the United States For the District of Nebraska.

The Updike Grain Company, a Corporation, the Nebraska-Iowa Grain Company, a Corporation, and the Crowell Lumber & Grain Company, a Corporation, Complainants,

against

Union Pacific Railroad Company, Defendant.

The defendant in this case having sued out writs of error from the United States Circuit Court of Appeals for the Eighth Circuit, to the above entitled Circuit Court, in the case of each of the plaintiffs, and in the original case, and it appearing that one copy of the record herein and of the bill of exceptions will be sufficient for the prosecution of the several writs of error in the said Circuit Court of Appeals, and that copies thereof for each separate error proceeding in the Circuit Court of appeals will be unnecessary,

It is Hereby stipulated by the respective counsel for the plaintiffs and the defendant that the Clerk of this Court shall transmit to the Clerk of the said Circuit Court of Appeals but one copy of the record and bill of exceptions, and that the said record and bill of exceptions may be considered in the said Circuit Court of Appeals as a record in each of the separate cases in which error has been prosecuted.

SMYTH & SMITH,
Attorney for Plaintiffs.

EDSON RICH,
Attorney for Defendant.

(Endorsed): Filed Aug. 10, 1909. Geo. H. Thummel, Clerk.

452 United States of America,
District of Nebraska,
Omaha Division—ss.

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, hereby certify that pursuant to the foregoing Writ of Error, and in obedience thereto, and in compliance with the Praecipe, a copy of which is found on page 450 hereof, the foregoing record has been made and that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court, as mentioned in said praecipe, and as indicated in the foregoing Index, in the case of Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, vs. Union Pacific Railroad Company, No. 161, Docket "Y," and that copies of the Writ of Error and Citation, duly certified have been lodged and remain of record in my said office as such Clerk.

Seal
U. S. Circuit Court
Nebraska District
Omaha Division.

Witness my hand and the seal of said Court at Omaha in said District this 23rd day of August, A. D. 1909.

GEO. H. THUMMEL, Clerk.

Filed Aug. 25, 1909. John D. Jordan, Clerk.

(*Appearance of Counsel for Plaintiff in Error.*)

On the twenty-seventh day of August, A. D. 1909, the appearance of counsel for the plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, and CROWELL LUMBER AND GRAIN COMPANY.

The Clerk will enter my appearance as Councel for the Plaintiff in Error.

EDSON RICH,
Omaha, Neb.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3135. Union Pacific Railroad Co., Pl'ff in Error, vs. Updike Grain Company, et al. Appearance. Filed Aug. 27, 1909, John D. Jordan, Clerk. Edson Rich, Counsel for Pl'ff in Error.

(*Appearance of Counsel for Defendants in Error.*)

And on the twenty-ninth day of October, A. D. 1909, the appearance of counsel for the defendants in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE UPDIKE GRAIN COMPANY et al.

The Clerk will enter *my* appearance as Counsel for the Defendants in error.

EDWARD P. SMYTH.
C. J. SMYTH.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3135. Union Pacific Railroad Company, Plaintiff in Error, vs. The Updike Grain Company, et al. Appearance. Filed Oct. 29, 1909, John D. Jordan, Clerk. Edward P. Smyth, C. J. Smyth, Counsel for Defendants in Error.

(*Order of Submission.*)

And on the eleventh day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

Tuesday, January 11, 1910.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE UPDIKE GRAIN COMPANY et al.

In Error to the Circuit Court of the United States for the District of Nebraska.

This cause having been called for hearing in its regular order and Judge W. H. Munger being disqualified retires and takes no part in the hearing or consideration thereof. Thereupon argument was commenced by Mr. Edson Rich in behalf of the plaintiff in error, continued by Mr. Edward P. Smith for defendants in error and concluded by Mr. Edson Rich for the plaintiff in error. Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the eighteenth day of April, A. D. 1910, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3135, December Term, A. D. 1909.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE UPDIKE GRAIN COMPANY et al., Defendants in Error.

In Error to the Circuit Court of the United States for the District of Nebraska.

No. 3136, December Term, A. D. 1909.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE UPDICKE GRAIN COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Nebraska.

No. 3137, December Term, A. D. 1909.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
NEBRASKA-IOWA GRAIN COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Nebraska.

No. 3138, December Term, A. D. 1909.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
CROWELL LUMBER & GRAIN COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the District of Nebraska.

Mr. Edson Rich, (Mr F. C. Dillard and Mr. N. H. Loomis were with him on the brief) for Plaintiff in Error.

Mr. Edward P. Smith, (Mr. Constantine J. Smyth was with him on the brief) for Defendants in Error.

Before Sanborn and Adams, Circuit Judges, and Riner, District Judge.

SYLLABUS.

1. *Carriers—Interstate Commerce Act—Carriers May Exercise Common Law Rights Except as Prohibited Thereby.*

An interstate common carrier is free to exercise all his rights under the common law to the full extent to which such exercise has not been made unlawful by the Interstate Commerce Act.

2. *Same—Carries—Interstate Commerce Act Prohibits Undue and Unreasonable Prejudices and Disadvantages Only.*

The interstate Commerce Act does not prohibit the giving of all preferences and advantages or the *production* of all prejudices and disadvantages. It prohibits only those that are undue and unreasonable.

3. *Same—Unjust Discrimination and Undue Prejudice—Facts—Conclusion.*

The tariffs of the Union Pacific Railroad Company offered compensation for elevation of grain in transit on condition that cars delivered by it loaded to elevators or connecting lines should be returned to it empty within 48 hours after their delivery. The rules which governed the switching and disposition of cars provided that foreign cars and cars belonging to the companies which had a direct connection with the switching territory should be delivered or sent to their owners so that the complainants who were the owners of elevators upon railroad tracks other than those of the Union Pacific Company could not possibly return such cars to that Company after they were unloaded, while Peavey & Company which had an elevator upon the tracks of the Union Pacific Company could and did deliver such cars back to that Company immediately after they were unloaded and the Union Pacific Company paid it compensation for elevating the grain unloaded from these cars while it refused to pay complainants any compensation for unloading cars of like character.

Held: This course of proceeding wrought an unjust discrimination against, and an undue prejudice to, the complainants which entitled them to recover damages in reparation.

4. *Same.*

The complainants returned more than 48 hours after their delivery to connecting lines certain cars and the Union Pacific Company refused to pay them compensation for elevating the grain out of these cars. The delay in the return of these cars was not due to the Union Pacific Company, but to companies having connecting lines to whom these cars were delivered by the Union Pacific Company by direction of the complainants or of consignors to the complainants and the Union Pacific Company paid no elevation charges to Peavey & Company on grain unloaded from cars which were not returned to the Union Pacific Company within 48 hours.

Held: There was no unjust discrimination or undue prejudice in this course of proceeding and the complainants were not entitled to any damages because they received no compensation for elevation services in connection with such cars.

SANBORN, Circuit Judge, delivered the opinion of the court.

The Union Pacific Railroad Company sued out four writs of error to reverse a judgment against it in favor of The Updike Grain Company for $7,416.31, Nebraska-Iowa Grain Company for $2,760.71 and Crowell Lumber & Grain Company for $754.15. It sued out a writ against all the defendants in error and one against each of them because it was in doubt whether or not it could assail by the first writ the judgment in favor of each of the defendants in error. This judgment was the result of a suit brought by the three defendants in error under Paragraph 3 of Section 16, of the Interstate Commerce Act, 34 Stat. 590, which provides that all parties in whose favor the Interstate Commerce Commission has awarded damages by a single order may be joined as plaintiffs in a suit to recover those damages. As in such a suit separate recoveries in favor of each plaintiff and against each defendant respectively may be secured by a single judgment, that judgment and every part of it may be challenged by a single writ of error to which all in interest are made parties. This case will, therefore, be considered upon the writ of error against all the defendants in error and the writs against each of them respectively will be dismissed without costs.

The Commission awarded the damages that are the subject of this action because the Union Pacific Company had not paid to the defendants in error, which were corporations owning elevators at Omaha, the rates for the elevation of grain specified in its published tariffs between July 27, 1906, and June 29, 1908, while it had paid these rates for similar services to the owners of other elevators in that city. These tariffs provide that "To expedite the movement and to secure the prompt release and return of equipment an allowance of (1¼ cents prior and ¾ of a cent subsequent to June 1, 1907), will be made by the Union Pacific Railroad to the elevators performing the service on grain in carloads transferred by the elevators at Omaha" on the condition, among others, that "no allowance will be made when more than 48 hours elapse between time of delivery of loads by the Union Pacific to the elevator or connecting lines and the release and return of the empty cars to the Union Pacific." The Union Pacific Company had been under a contract sine 1899, to make an allowance of this character to Peavey & Company, a corporation which had built and was operating an elevator on the tracks of the Union Pacific Company at Council Bluffs, which is treated as a part of Omaha henceforth in this opinion, in reliance upon this agreement. The tariffs which offered this compensation for elevation and transfer to the owners of all elevators at Omaha which rendered the service had been made for the purpose of complying with a decision of the Commission rendered April 9, 1907, to the effect that the Pacific Company would subject itself to the charge of an unjust discrimination unless it furnished elevation to shippers who could not use at Omaha the elevator of Peavey & Company on the same terms which it gave to those who could do so. In re Allowances to Elevators, 12 I. C. C. R. 85, 88. Subsequently

and on June 29, 1908, the Commission decided that the allowance or payment by the Pacific Company to Peavey & Company of any compensation for the elevation and transfer in transit of grain which it shipped and owned was unlawful because it derived, or might derive, a commercial advantage from cleaning, clipping, mixing, grading and inspecting the grain during its elevation, and because there was danger that such a practice might lead the parties to it to violate the prohibition of rebates and of unjust discrimination embodied in the Interstate Commerce Act. In re Allowances to Elevators, 14 I. C. C. R. 315, 316. It also held that all allowances and payments to owners and operators of elevators for elevation in transit were unlawful and must cease. Traffic Bureau Merchants Exchange of St. Louis v. Chicago, Burlington & Quincy R. R. Co., 14 I. C. C. R. 317. Thereupon it issued orders which forbade the continuance of such allowances and payments.

Elevation in transit consists in the unloading of the cars which bring the grain to the elevator and the loading of the grain into those which carry it away. The defendants in error were the owners and shippers of the grain for the failure to pay for the elevation of which they have recovered damages, and also of the elevators with which they transferred it, and counsel for the Union Pacific Company insist that the payment of these damages is unlawful for the reasons which have been stated, and which induced the decisions and orders of the Commission which condemned these allowances and payments in the cases of Peavey & Company and the Traffic Bureau of St. Louis. But Peavey & Company and others brought and prosecuted suits in equity to enjoin and set aside these orders. These suits have been heard by three of the Circuit Judges of this Circuit and they have decided that those orders were beyond the power of the Commission, that the allowance or payment by a railroad company of reasonable compensation to the owner of an elevator for the elevation in transit of grain he ships or owns is not violative of the Interstate Commerce Act, or of any other law, and that the payments and allowances offered in the tariffs of the Union Pacific Company which have been cited were reasonable and legal. The reasons for these conclusions are stated at considerable length in the opinion in those cases which meets the approval of this Court and it is deemed unnecessary to set them forth again here. F. H. Peavey & Company, et al. v. Union Pacific Railroad Company, et al. and Diffenbaugh, et al v. Interstate Commerce Commission, filed March — 1910, — Fed. —. The basis of the decision in this case, therefore, is that it was lawful for the Union Pacific Company to make the allowances and payments offered in its schedules.

The elevators of the defendants in error were not located upon the tracks of the Union Pacific Company and when cars came in over those tracks destined to these elevators that Company delivered them to a connecting railroad company or to the Union Stockyards Company, whose tracks connected with those of the railroad companies which entered South Omaha, and one or both of these companies switched these cars to their respective elevator

destinations. The regulations of the American Railway Association, which by consent of the companies parties to this action who were members of this organization, governed the handling of these cars, required each car received loaded in switching service to be confined to switching territory and to be returned when empty to its owner if that owner had a direct connection within the switching territory. Every connecting carrier had and exercised the right to retain in its possession its empty cars. A portion of the damages recovered below consisted of an amount equal to the charge for elevation on grain unloaded by the defendants in error from cars which belonged either to the company which performed the switching service or to a company which had a direct connection in the switching territory. These cars when empty were not and could not be transferred to the Union Pacific Company under the governing rules. They were retained by their owners and counsel contend that no damages can be recovered for the failure to pay the elevation charges upon these cars because the tariffs declared that the condition of the payment for elevation was that the empty cars should be returned to the Union Pacific Company within 48 hours after their delivery to the connecting line. But the Union Pacific Company paid to Peavey & Company the elevation charge on cars of this class delivered to its elevators. It is true that these cars were at the command of the Union Pacific Company empty within 48 hours because they were never delivered to any other carrier. Nevertheless, it was impossible for the defendants in error under the controlling rules to return cars of this class to the Union Pacific Company at any time and the inevitable effect of the payment of the elevation charge on such cars to Peavey & Company when the defendants in error could not secure it under the specifications of the tariffs was to give shippers in this class of cars through the elevators of Peavey & Company a clear advantage of the amount of the elevation charge over shippers in cars of the same class through the elevators of the defendants in error. There was, therefore, no error in the opinions of the Commission and of the court below that this difference in operation and payment constituted an unjust discrimination which entitled the defendants in error to damages in reparation.

For the same reason there was no error in allowing to the Updike Company for the failure of the Union Pacific Company to pay the elevation charge on grain unloaded from foreign cars, that is, from cars owned by companies which had no railroads into Omaha or South Omaha, such as the Pennsylvania Company, or the New York Central Company. Cars of this character were required by the rules of the Association to be and they were, when emptied, loaded by some route so that the home road would participate in the freight or loaded to an intermediate road in the direction of the home road. The result was that when these cars came to the elevator of the Updike Company from the Union Pacific Company and were unloaded the Updike Company could not return them to the Pacific Company. That Company paid the elevation charge upon cars of this class to Peavey & Company and its failure to

pay it to the Updike Company wrought an unjust discrimination on account of which the Updike Company was entitled to recover the damages which it sustained.

A portion of the damages recovered were on account of the failure of the Union Pacific Company to pay elevation charges on grain unloaded from cars which were returned to the Union Pacific Company more than 48 hours after they had been delivered to the connecting lines. The defendants in error returned 319 cars within the 48 hours and 222 cars after that time had elapsed. The condition of the payment of this elevation charge specified in the tariffs was that the cars should be returned within the 48 hours. The defendants in error returned 319 cars within that time and for the elevation of the grain from those cars they have recovered and are entitled to retain their damages. But why should they receive damages for the failure of the Union Pacific Company to pay elevation charges on the 222 cars which were returned after the 48 hours had elapsed? Counsel say, because these cars were delayed by switching companies after they were delivered to them loaded, because the Union Pacific Company paid the switching charges to these connecting lines and collected them of the shippers and because the railroad companies entering Omaha have adopted a rule to the effect that no demurrage shall be charged to the company which does the terminal switching for four days. The evidence, however, is that a carload of grain can be unloaded into an elevator in thirty minutes after it is properly placed and that the defendants in error returned 319 cars within the 48 hours. It was not impossible, therefore, to return cars within the time specified in the tariffs. While it is true that the Union Pacific Company paid the connecting lines the switching charges upon these cars it is also true that it incurred and paid these charges on the orders of the defendants in error, or on the orders of consignors of grain to their elevators and that it subsequently collected these charges from the defendants in error. Generally, if not universally, the defendants in error were the purchasers and owners of the grain in the cars sent to their elevators and either they ordered the Union Pacific Company to send these cars to their elevators or those cars had been sent to the elevators from points of origin of the shipments. In either case the Union Pacific Company delivered them to the switching company by reason of the order of the owners or shippers of the grain. It paid the switching charges for and then collected them of the defendants in error. The legal result must be and is that the switching companies were in reality the servants of the elevator companies to switch the cars to and from their elevators. The defendants in error were the parties that desired and caused these cars to be sent from the Union Pacific railroad to their elevators. The Union Pacific Company had no interest in sending them there. Its interest was to retain, unload and use them upon its own railroads.

The rule of the companies that no demurrage should be charged during four days to the switching company fixed the extreme limit beyond which cars carrying burdens of various kinds which must be unloaded by hand and with shovels, by carting load by load and in

other ways which required much more time than the unloading of grain, might be held without demurrage and it is far from persuasive evidence that 48 hours was not ample time to switch and unload cars carrying grain.

The eastern terminus of the Union Pacific Company was at Council Bluffs which, for the purposes of this case, is treated as a part of Omaha. A vast volume of grain from the fields of Nebraska and Kansas passes through Omaha to eastern cities each year and by far the larger portion of it must be transported in a few months in the autumn and winter. The Union Pacific Company has the short haul of this grain. Other railroad companies whose rails reach from the grain fields west of the Missouri River through Omaha to eastern points are its constant competitors. If it permits its cars to go on east over the roads of other companies it loses their use on its own lines when that use is most lucrative and the grain within reach of it and of the companies having through lines is diverted from it and carried by the latter. The prompt unloading of its cars at its eastern terminus and their immediate return for new loads was, therefore, indispensable to its fair competition and reasonable participation in this transportation. It was to accomplish this result that the Union Pacific Company offered and paid the compensation for elevation in transit. Elevation of this nature is a part of transportation which railroad companies are required to furnish on request. 34 Stat. 584, Section 1. They have the legal right either to furnish it themselves or to hire others to provide it. Since they have the right to employ others to provide elevation they also have the indispensable right to prescribe the terms upon which they will make this employment, provided always those terms are neither unreasonable nor unjustly discriminatory. 34 Stat. 589, 590, Section 15; 24 Stat. 380, Section 3. The Pacific Company offered compensation for elevation at Omaha on condition only that the cars carrying the grain should be returned within 48 hours to the end that it might have the full use of them on its own rails during the carrying season. The fact that the defendants in error returned 319 cars within this time, the fact that a car can be unloaded at an elevator in thirty minutes, the proximity of these elevators to the tracks upon which the Union Pacific Company delivered the cars to the switching company and a review of all the evidence in this record has convinced — that 48 hours was a reasonable time to allow for the unloading and return of these cars. The switching company was in reality the agent and servant of the defendants in error. It was serving them at their request and for their benefit and they ultimately paid for the service. The Union Pacific Company therefore offered this compensation for elevation in transit upon the condition which has been named. A compliance with that condition was indispensable to the acceptance of that offer. The defendants in error failed to comply with it and, therefore, they never became entitled to the compensation. No allowance or compensation was made to Peavey & Company on cars not returned empty within the 48 hours so that there was no unjust discrimination or undue prejudice here. And the defendants were not entitled to recover damages for the failure of the Union Pacific Company to

pay them for the elevation of grain out of cars which were returned without fault of the latter named Company by them more than 48 hours after they were delivered by the Union Pacific Company to the connecting lines.

The judgment in favor of the Nebraska-Iowa Grain Company must be reversed accordingly and the case between it and the Union Pacific Company must be remanded to the court below, unless within sixty (60) days from the filing of this opinion it remits all of that judgment, except $1612.51, and interest thereon at 6 per cent per annum since July 22, 1907, and its costs of suit, and files in this court a certified copy of such remittitur, in which event the judgment in its favor for that amount may be affirmed.

The judgment in favor of the Updike Grain Company must be reversed and the case between it and the Union Pacific Company must be remanded to the court below for a new trial, unless within sixty (60) days from the filing of this opinion it remits all of the judgment in its favor, except $6310.18, and interest thereon at 6 per cent per annum since July 22, 1907, and its costs of suit and files in this court a certified copy of such remittitur, in which event the judgment in its favor for that amount may be affirmed.

The judgment in favor of the Crowell Lumber & Grain Company must be reversed and the case between it and the Union Pacific Company must be remanded to the court below for a new trial, unless within sixty (60) days from the filing of this opinion it remits all of the judgment in its favor, except $314.11, and interest thereon at 6 per cent per annum since July 22, 1907, and its costs of suit and files in this court a certified copy of such remittitur, in which event the judgment in its favor for that amount may be affirmed. And it is so ordered.

Filed April 18, 1910.

(Nisi Judgment.)

And on the eighteenth day of April, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a nisi judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

Monday, April 18, 1910.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,

vs.

THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, and THE CROWELL LUMBER AND GRAIN COMPANY.

In Error to the Circuit Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Nebraska, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, in favor of The Updike Grain Company be reversed and the cause remanded to the Court below for a new trial, unless within sixty (60) days from the filing of this opinion it remits all of the judgment in its favor, except $6310.18, and interest thereon at 6 per cent per annum since July 22, 1907, and its costs of suit and files in this Court a certified copy of such remittitur, in which event the judgment in its favor for that amount will be affirmed.

It is further ordered that the judgment in favor of the Nebraska-Iowa Grain Company be reversed and the cause remanded to the Court below for a new trial, unless within sixty (60) days from the filing of this opinion it remits all of that judgment, except $1612.51, and interest thereon at 6 per cent per annum since July 22, 1907, and its costs of suit, and files in this Court a certified copy of such remittitur, in which event the judgment in its favor for that amount will be affirmed.

It is further ordered that the judgment in favor of Crowell Lumber and Grain Company be reversed and the cause remanded to the Court below for a new trial, unless within sixty (60) days from the filing of this opinion it remits all of the judgment in its favor, except $314.11, and interest thereon at 6 per cent per annum since July 22, 1907, and its costs of suit and files in this Court a certified copy of such remittitur, in which event the judgment in its favor for that amount will be affirmed.

April 18, 1910.

(*Certified Copy of Remittitur by The Updike Grain Company.*)

And on the eighth day of June, A. D. 1910, a certified copy of the Remittitur by The Updike Grain Company was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

THE UPDIKE GRAIN COMPANY, a Corporation, et al., Plaintiffs,
vs.
THE UNION PACIFIC RAILROAD COMPANY, Defendant.

Comes now the Updike Grain Company and does hereby remit from the judgment rendered in this cause "All of the judgment in its favor except $6310.08 with interest thereon at 6 per cent per annum since July 22nd, 1907, and its costs of suit."

UPDIKE GRAIN COMPANY,
By N. B. UPDIKE, *Its President.*

Endorsed: Filed Jun- 7 1910. Geo. H. Thummel, Clerk.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify the foregoing to be a true and correct copy of Remittitur by Updike Grain Company in case of The Updike Grain Company, a corporation, et al., vs. Union Pacific Railroad Company, No. 161 Docket "Y" as the same appears of record in my office.

Witness my hand and the seal of said Court at Omaha in said District this 7th day of June, A. D. 1910.

[SEAL.] GEO. H. THUMMEL, *Clerk*,
By JOHN NICHOLSON, *Deputy*.

(Endorsed:) No. 3155. No. 161 Doc. "Y" United States Circuit Court, District of Nebraska. Omaha Division. The Updike Grain Company, et al., vs. Union Pacific Railroad Co. Certified copy of Remittitur by The Updike Grain Company. Filed Jun- 8, 1910. John D. Jordan, Clerk.

(Certified Copy of Remittitur by Crowell Lumber & Grain Co.)

And on the eighth day of June, A. D. 1910, a certified copy of the Remittitur by the Crowell Lumber & Grain Company was filed in said cause, in the words and figures following, to-wit:

In the Circuit Court of the United States for the District of Nebraska.

THE UPDIKE GRAIN COMPANY, a Corporation, et al., Plaintiffs,
vs.
THE UNION PACIFIC RAILROAD COMPANY, Defendant.

Remittitur.

Comes now the Crowell Lumber & Grain Company and does hereby remit from the judgment rendered in this cause "All of the judgment in its favor except $314.11 with interest thereon at 6 per cent per annum since July 22nd, 1907, and its cost of suit."

CROWELL LUMBER & GRAIN COMPANY,
By C. C. CROWELL, JR., *Its Vice-President*.

Endorsed: Filed May 31 1910. Geo. H. Thummel, Clerk.

UNITED STATES OF AMERICA,
District of Nebraska, Omaha Division, ss:

I, Geo. H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify the foregoing to be a true and correct copy of Remittitur in case of Updike Grain Company, et al., vs. Union Pacific Railroad Company, No. 161 Docket "Y" as the same appears of record in my office.

Witness my hand and the seal of said Court at Omaha in said District this 31st day of May, A. D. 1910.

[SEAL.] GEO. H. THUMMEL, *Clerk.*

(Endorsed:) No. 3135. No. 161 Doc. "Y" United States Circuit Court, District of Nebraska. Omaha Division. Updike Grain Company, et al., vs. Union Pacific Railroad Co. Certified copy of Remittitur by Crowell Lumber Co. Filed Jun- 8, 1910. John D. Jordan, Clerk.

(*Final Judgment.*)

And on the eighteenth day of June, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals for the Eighth Circuit is a final judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1910.

Saturday, June 18, 1910.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
vs.
THE UPDIKE GRAIN COMPANY, THE NEBRASKA-IOWA GRAIN COMPANY, and THE CROWELL LUMBER AND GRAIN COMPANY.

In Error to the Circuit Court of the United States for the District of Nebraska.

This cause came on this day to be heard, and one of the plaintiffs below, The Updike Grain Company, in pursuance of the terms of the order of this Court entered on the 18th day of April, 1910, having filed in the office of the Clerk of the Circuit Court of the United States for the District of Nebraska, where the record of the cause and the judgment now remain, a remittitur of all the judgment in its favor, except the sum of $6310.18, and interest thereon at six per cent. per annum since July 22, 1907, and its costs of suit, and has filed in the office of the Clerk of this Court a duly certified copy of the said remittitur so filed in the Circuit Court of the United States for the District of Nebraska, it is on consideration thereof, now here

Ordered and adjudged by this Court that the judgment of the said Circuit Court, in this cause, in favor of The Updike Grain Company, as so reduced, be, and the same is hereby, affirmed with costs; and that the Updike Grain Company have and recover against the Union Pacific Railroad Company the sum of twenty dollars for its costs herein and have execution therefor.

And it further appearing that The Crowell Lumber and Grain Company, another of the plaintiffs below, in pursuance of the order

of this Court entered on April 18, 1910, has also filed in the office of the Clerk of the said Circuit Court, where the record of the cause and the judgment now remain, a remittitur of all the judgment in its favor, except the sum of $314.11, and interest thereon at six per cent. per annum since July 22, 1907, and its costs of suit, and has filed in the office of the Clerk of this Court a duly certified copy of the said remittitur, it is on consideration thereof, now here

Ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, in favor of The Crowell Lumber and Grain Company, as so reduced, be, and the same is hereby, affirmed with costs; and that The Crowell Lumber and Grain Company have and recover against the Union Pacific Railroad Company, the sum of twenty dollars for its costs herein and have execution therefor.

And it further appearing that the Nebraska-Iowa Grain Company, one of the plaintiffs below, has wholly failed to file a remittitur of any portion of the judgment of the said Circuit Court in its favor, and to otherwise comply with the terms of said order of this Court entered April 18, 1910, it is on consideration thereof now here ordered by this Court, that the judgment of the said Circuit Court in this cause, in favor of the Nebraska-Iowa Grain Company be, and the same is hereby, reversed and this cause is as to the Nebraska-Iowa Grain Company, remanded to the said Circuit Court with a direction to grant a new trial.

It is further ordered that the Union Pacific Railroad Company have and recover against the Nebraska-Iowa Grain Company one-fourth of the costs in this Court, including the cost of the transcript from the Circuit Court, to be taxed by the Clerk of this Court, except the portion of the cost of the transcript, which shall be taxed in the Court below, and that when so ascertained and taxed an execution may issue from the Circuit Court to collect such costs.

June 18, 1910.

(Petition for Writ of Error as to all Defendants in Error.)

And on the eighteenth day of June, A. D. 1910, a petition for writ of error as to all Defendants in Error was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,

v.

THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

Petition for Writ of Error.

Your petitioner, Union Pacific Railroad Company, Plaintiff in Error in the above entitled cause, respectfully shows that the said

cause is now pending in the United States Circuit Court of Appeals, Eighth Circuit, and that judgment has been rendered on the 18th day of April, A. D., 1910, and the 18th day of June, A. D., 1910, in part affirming the judgment of the Circuit Court of the United States for the District of Nebraska, Omaha Division, in favor of the Defendants in Error, and against the Plaintiff in Error, in which judgment of affirmance of the said United States Circuit Court of Appeals for the Eighth Circuit, and the proceedings had in this cause prior thereto, certain errors were committed to the prejudice of the Plaintiff in Error, who was defendant in the Circuit Court of the United States for the District of Nebraska; that the matter in controversy in said suit exceeds One Thousand Dollars, besides costs; that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; that this cause does not arise under the patent laws nor the revenue laws nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and therefore your petitioner respectfully prays that a writ of error be allowed it in the above entitled cause directing the clerk of the United States Circuit Court of Appeals, Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the Assignment of Errors herewith filed by the Plaintiff in Error may be reviewed, and if error be found, corrected according to the laws and customs of the United States, and also that an order be made fixing the amount of security which the Plaintiff in Error shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in the said United States Circuit Court of Appeals, Eighth Circuit, and of the Circuit Court of the United States for the District of Nebraska, be suspended and staved until the determination of the said Writ of Error by the Supreme Court of the United States.

And your petitioner will ever pray.

UNION PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*
By F. C. DILLARD,
R. W. BLAIR,
N. H. LOOMIS,
EDSON RICH, &
E. H. CROCKER,
Its Attorneys.

The foregoing petition is granted and Writ of Error is allowed as prayed for upon the Plaintiff in Error giving bond, according to law, in the sum of $15,000.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 3135. In the United States Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Company, a corporation, et al., Defendants in Error. Petition for Writ of Error as to all Defendants in Error. Filed Jun- 18, 1910. John D. Jordan, Clerk.

(Assignment of Errors as to all Defendants in Error.)

And on the eighteenth day of June, A. D. 1910, an assignment of errors as to all Defendants in Error was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

Assignment of Errors.

And now comes the Plaintiff in Error, Union Pacific Railroad Company, Defendant in the Circuit Court of the United States for the District of Nebraska, and Plaintiff in Error in the United States Circuit Court of Appeals, Eighth Circuit, and says that there is manifest error in the record and proceedings in the above entitled cause in the Circuit Court of the United States for the District of Nebraska, and likewise in the United States Circuit Court of Appeals, Eighth Circuit, and that the judgments of the said courts, and particularly that of the United States Circuit Court of Appeals, Eighth Circuit, are erroneous and against the just rights of the Plaintiff in Error, and that manifest error has intervened to the prejudice of Union Pacific Railroad Company, Plaintiff in Error, in this, to-wit:

1st. The Plaintiff in Error assigns and reaffirms the several assignments of error set out in the Assignment of Errors filed in the Circuit Court of the United States, District of Nebraska, in the above entitled cause, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, and separately assigns as error on the part of the said United States Circuit Court of Appeals, Eighth Circuit, the action of the said Court in overruling, except as to the remittiturs ordered, each of the said Assignments of Error, said assignments being particularly set out in Assignments of Error, Nos. 2 to 23, inclusive, of this Assignment of Errors.

2nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the first assignment of error

filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"1st. The verdict is not sustained by sufficient evidence."

3rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the second assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"2nd. The verdict is contrary to law."

4th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the third assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"3rd. Errors of law occur-ing at the trial and duly excepted to at the time."

5th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fourth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"4th. The Court erred in overruling the defendant's objection to the introduction of any evidence on the part of the plaintiffs on the ground that the petition failed to state a cause of action against the defendant, to which ruling of the court the defendant at the time duly excepted."

6th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fifth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"5th. The Court erred in overruling the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the several plaintiffs, to which ruling of the Court the defendant at the time duly excepted."

7th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the sixth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"6th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant, and against The Up-

dike Grain Company, to which ruling of the Court the defendant at the time duly excepted."

8th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the seventh assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"7th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the Court the defendant at the time duly excepted."

9th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the eighth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"8th. The court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the court the defendant at the time duly excepted."

10th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the ninth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"9th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the plaintiffs."

11th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the tenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"10th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Updike Grain Company, to which ruling of the Court the defendant at the time duly excepted."

12th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the eleventh assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, towit:

"11th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the court the defendant at the time duly excepted."

13th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twelfth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"12th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the court the defendant at the time duly excepted."

14th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the thirteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"13th. The Court erred in sustaining the motion made by the plaintiffs, at the close of all the testimony in the case, to direct a verdict in favor of the plaintiffs and against the defendant, to which ruling of the Court the defendant at the time duly excepted."

15th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fourteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"14th. The Court erred in directing the jury to find a verdict in favor of the Nebraska-Iowa Grain Company for the sum of $2,509.74, with interest from July 22, 1907, to which action of the Court the defendant at the time duly excepted."

16th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fifteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"15th. The Court erred in directing the jury to find a verdict in favor of the Crowell Lumber & Grain Company for $698.29, with interest from December 26, 1907, to which action of the court the defendant at the time duly excepted."

17th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the sixteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"16th. The Court erred in directing the jury to find a verdict in favor of the Updike Grain Company for $6742.10, with interest from July 1st, 1907, to which action of the court the defendant at the time duly excepted."

18th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the seventeenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"17th. The Court separately erred in directing the jury to return a verdict in favor of each of the plaintiffs, the Nebraska-Iowa Grain Company, the Crowell Lumber & Grain Company, and the Updike Grain Company, to which action of the court the defendant at the time duly excepted."

19th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the eighteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"18th. The Court erred in ordering, rendering and entering judgment in favor of the Nebraska-Iowa Grain Company."

20th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the nineteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"19th. The Court erred in ordering, rendering and entering judgment in favor of the Crowell Lumber & Grain Company."

21st. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twentieth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"20th. The Court erred in ordering, rendering and entering judgment in favor of the Updike Grain Company."

22nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twenty-first assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"21st. The court erred in instructing the jury in the following words: 'I will cut this matter short and say to you, Gentlemen of the Jury, that the Court will relieve you of responsibility in the matter, so that you need not have any compunctions of conscience, and will direct you to return a verdict for the Nebraska-Iowa Grain Company in the sum of $2509.74, with interest from July 22, 1907; and

in favor of the Crowell Lumber and Grain Company find a verdict in their favor for $698.29, with interest from December 26, 1907, and in the case of The Updike Grain Company for $6742.10, with interest from July 1st, 1907,' to the giving of which instruction the defendant duly excepted at the time and in the presence of the jury."

23rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twenty-second assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"22nd. The Court erred in overruling the motion for a new trial filed by the defendant herein."

24th. The United States Circuit Court of Appeals, Eighth Circuit, separately erred in not sustaining each of the assignments of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, said assignments being particularly set out in Assignments of Error, Nos. 2 to 23, inclusive, of this Assignment of Errors.

25th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur, in entering jugment affirming, to the extent of Six Thousand, Three Hundred and Ten, and 18/100, ($6310.18) and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of The Updike Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on May 14, 1909, in favor of the Defendant in Error, The Updike Grain Company, and against the Plaintiff in Error.

26th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur, in entering judgment affirming, to the extent of Three Hundred and Fourteen & 11/100 ($314.11) Dollars and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of the Crowell Lumber & Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, and against the Plaintiff in Error.

27th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed, in entering judgment affirming, to the extent of Six Thousand, Three Hundred and Ten & 18/100, ($6310.18) Dollars and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of The Updike Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on May 14, 1909, in favor of the Defendant in Error, The Updike Grain Company, and against the Plaintiff in Error.

28th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed, in entering judgment affirming, to the extent of Three Hundred and Fourteen & 11/100

($314.11) Dollars and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of the Crowell Lumber & Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, and against the Plaintiff in Error.

29th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering a remittitur of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of The Updike Grain Company, in affirming said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of said The Updike Grain Company.

30th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of The Updike Grain Company, in affirming said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the said The Updike Grain Company.

31st. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of the Crowell Lumber & Grain Company, in affirming the said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the Crowell Lumber & Grain Company.

32nd. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed of part of the judgment of the Circuit Court of the United States for the District of Nebraska, in favor of the Crowell Lumber & Grain Company, in affirming the said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the Crowell Lumber & Grain Company.

33rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment rendered in the Circuit Court of the United States for the District of Nebraska against the Plaintiff in Error and in favor of the Defendant in Error, The Updike Grain Company.

34th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment rendered in the Circuit Court of the United States for the District of Nebraska against the Plaintiff in Error and in favor of the Crowell Lumber & Grain Company, Defendant in Error.

35th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the United States Circuit Court for the District of Nebraska rendered on the 14th day of May, 1909, in favor of the Defendant in Error, The Updike Grain Company, for the sum of Seven Thousand, Four Hundred and Sixteen & 31/100 ($7,416.31) Dollars and costs of suit against Plaintiff in Error, and in not remanding the said cause to the said Circuit Court

of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and said Defendant in Error, The Updike Grain Company.

36th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not absolutely reversing the judgment of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of the Defendant in Error, Nebraska-Iowa Grain Company, for the sum of Two Thousand, Seven Hundred and Sixty & 71/100 ($2,760.71) Dollars and costs of suit against Plaintiff in Error.

37th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, for the sum of Seven Hundred and Fifty-four & 15/100 ($754.15) Dollars and its costs of suit, and in not remanding the said cause to the Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and the said Defendant in Error, Crowell Lumber & Grain Company.

38th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgments of the Circuit Court of the United States for the District of Nebraska rendered on the 14th day of May, 1909, in favor of each of the Defendants in Error, The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company against the Plaintiff in Error, and in not remanding the entire cause to the said Circuit Court of the United States for the District of Nebraska for a new trial.

39th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not finding in favor of the Plaintiff in Error upon the record sent to the said United States Circuit Court of Appeals in response to the Writ of Error to the Circuit Court of the United States for the District of Nebraska.

40th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgments for the remainder of the amounts found for each of the defendants in error, The Updike Grain Company and Crowell Lumber & Grain Company in the Circuit Court of the United States for the District of Nebraska for the reason that said judgments were founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgments.

41st. The United States Circuit Court of Appeals, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska in favor of the Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgments for the remainder of the amounts found for the Defendants in Error, The Updike Grain

Company and Crowell Lumber & Grain Company, and each of them, in the said Circuit Court of the United States for the District of Nebraska, for the reason that said judgments were founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgments.

42nd. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgment for the remainder of the amount found for the said Defendant in Error, The Updike Grain Company, in the said Circuit Court of the United States for the District of Nebraska, for the reason that such judgment was founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgment.

43rd. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company, and Crowell Lumber & Grain Company, erred in affirming the judgment for the remainder of the amount found for the Defendant in Error, Crowell Lumber & Grain Company, in the said Circuit Court of the United States for the District of Nebraska, for the reason that such judgment was founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgment.

44th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering the remittiturs as shown in the judgment, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amounts found in the said court for and in favor of The Updike Grain Company and Crowell Lumber & Grain Company, and each of them, on the ground that the said Grain Companies were discriminated against by the contract made with F. H. Peavey & Company, and by reason of the amounts paid to F. H. Peavey & Company under the said contract and in accordance with the published tariffs of the Plaintiff in Error, because the said contract and the tariffs issued in pursuance thereof provided for the performance of a transportation service, and the Plaintiff in Error could legally employ whom it would to perform this service without thereby discriminating against others whom it failed to so employ.

45th. The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, and each of them, in so far as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing

The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company to elevate grain, was employing the said companies to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

46th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of The Updike Grain Company, in so far as the said judgment embraces amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing The Updike Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

47th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of the Nebraska-Iowa Grain Company, in so far as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing the Nebraska-Iowa Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

48th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of the Crowell Lumber & Grain Company, in so far as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing the Crowell Lumber & Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

49th. The United States Circuit Court of Appeals, Eighth Circuit,

erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for attorneys' fees, which error is fundamental and apparent of record, because such judgment was based upon an award of the Interstate Commerce Commission, and the failure of the Plaintiff in Error to abide by it, when the law giving the power to such commission to make such award is unconstitutional in that it delegates to such Commission legislative powers and combines in them powers which are executive, legislative and judicial.

50th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for attorneys' fees, which error is fundamental and apparent of record, because to impose upon a carrier the necessity of paying such award if it resists an order of the Commission granting reparation, and is cast in the action on such order, is to deprive it of the equal protection of the law, and to deprive it of its property without due process of law.

51st. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendants in Error, and each of them to recover upon the theory that the Plaintiff in Error discriminated against the Defendants in Error in paying Peavey & Company, under the contract and tariffs, for the performance of transportation services.

52nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendant in Error, The Updike Grain Company, to recover upon the theory that the Plaintiff in Error discriminated against the Defendant in Error, The Updike Grain Company, in paying Peavey & Company, under the contract and tariffs, for the performance of transportation services.

53rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendant in Error, the Crowell Lumber & Grain Company, to recover upon the theory that the Plaintiff in Error discriminated against the Defendant in Error, Crowell Lumber & Grain Company, in paying Peavey & Company, under the contract and tariffs, for the performance of transportation services.

54th. The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that discrimination against one patron of a railroad company could follow as the result of the full performance of a legal contract made and entered into with another patron of the same railroad company.

55th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing entirely, and in each and every part thereof, and as to each and all the Defendants in Error, the judgment entered by the Circuit Court of the United States for the District of Nebraska on the 14th day of May, 1909, in favor of the Defendants in Error respectively, and against the Plaintiff in Error: and in not remanding the whole cause to the said Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and each and all of the Defendants in Error.

56th. The United States Circuit Court of Appeals, Eighth Circuit, erred in rendering judgment against the Plaintiff in Error and in favor of the Defendants in Error for costs of suit in the said United States Circuit Court of Appeals.

Wherefore the said Union Pacific Railroad Company, Plaintiff in Error, prays that for the errors aforesaid, and other errors appearing in the record of the said United States Circuit Court of Appeals, in the above entitled cause, to the prejudice of the Plaintiff in Error, the said judgment of the United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that the said cause be remanded to the Circuit Court of the United States for the District of Nebraska, Omaha Division, with instructions to grant a new trial in said cause, or for such further proceedings in the said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

UNION PACIFIC RAILROAD COMPANY,
By F. C. DILLARD,
R. W. BLAIR,
N. H. LOOMIS,
EDSON RICH &
E. H. CROCKER,
Its Attorneys.

(Endorsed:) No. 3135. In the United States Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Company, a corporation, et al., Defendants in Error. Assignment of Errors filed with Petition for Writ of Error as to all Def'ts in Error. Filed Jun- 18, 1910, John D. Jordan, Clerk.

(*Supersedeas Bond on Writ of Error as to all Defendants in Error.*)

And on the twenty-fifth day of June, A. D. 1910, a supersedeas bond on writ of error as to all the Defendants in Error was filed in said cause, in the words and figures following, to-wit:

Bond.

Know all men by these presents: That we, Union Pacific Railroad Company, as principal, and Luther Drake, as surety, are held and firmly bound unto the Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, in the just sum of Fifteen thousand dollars, ($15,000) to be paid to the said The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals this 18th day of June, in the year of our Lord, One Thousand, Nine Hundred and Ten.

Whereas, lately at a session of the United States Circuit Court of Appeals, Eighth Circuit, in a suit depending in said court between Union Pacific Railroad Company, Plaintiff in Error, and The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, Defendants in Error, a judgment was rendered against said Union Pacific Railroad Company, and said Union Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, Defendants in Error, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 21st day of July next.

Now the condition of the above obligation is such that if the said Union Pacific Railroad Company shall prosecute said Writ of Error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] UNION PACIFIC RAILROAD COMPANY, *Principal,*
By A. L. MOHLER, *Vice Pres't.*

Attest:
ALEX. MILLAR, *Secretary.*

LUTHER DRAKE, *Surety.* [SEAL.]

Sealed and delivered in the presence of:
E. H. CROCKER.

Approved to operate as a supersedeas by
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

STATE OF NEBRASKA,
County of Douglas, ss:

Luther Drake being first duly sworn, deposes and says that he is the surety named in the foregoing bond; that he is a resident of the County of Douglas, State of Nebraska and a property holder therein; that he is worth the sum of Thirty Thousand ($30,000.00) Dollars over and above all his debts and liabilities, and exclusive of property by law exempt from levy and sale on execution.

LUTHER DRAKE.

Subscribed in my presence and sworn to before me this 18th day of June, A. D., 1910.

[SEAL.] F. C. BULLOCK,
Notary Public within and for Douglas County, Nebraska.

My commission expires Dec. 1, 1912.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, George H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify that Luther Drake, surety in the foregoing bond is personally known to me; that he is worth more than double the amount of said bond; and if the said bond was presented to me for approval I would approve the same without hesitancy.

Witness my hand and the seal of said court at Omaha in said District this 18th day of June, A. D., 1910.

[SEAL.] GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3135. Union Pacific Railroad Co., Pl'ff in Error, vs. Updike Grain Company, et al. Supersedeas Bond on Writ of Error as to all defendants in error. Filed Jun- 25, 1910, John D. Jordan, Clerk.

(Writ of Error from the Supreme Court of the United States as to all the Defendants in Error.)

And on the twenty-fifth day of June, A. D. 1910, a writ of error from the Supreme Court of the United States as to all the Defendants in Error was filed in said cause, the original of which with the Clerk's return thereto is hereto attached and herewith returned:

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you between Union Pacific Railroad Company, plaintiff in error, and The Updike Grain Company, a corporation, Nebraska-Iowa Grain Company, a corporation, and Crowell Lumber & Grain Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error — by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date

hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22d day of June in the year of our Lord one thousand nine hundred and ten.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of July, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] No. 3135. U. S. Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, plaintiff in error, vs. The Updike Grain Company et al. Writ of error from the Supreme Court of the United States as to all the defendants in error. Filed Jun- 25, 1910. John D. Jordan, clerk.

(Citation on Writ of Error from the Supreme Court of the United States as to All Defendants in Error.)

And on the first day of July, A. D. 1910, a citation on writ of error from the Supreme Court of the United States as to all the Defendants in Error was filed in said cause, the original of which with the admission of service endorsed thereon, is hereto attached and herewith returned:

Citation.

UNITED STATES OF AMERICA, *ss:*

To The Updike Grain Company, Nebraska-Iowa Grain Company, and Crowell Lumber & Grain Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Union Pacific Railroad Company is plaintiff in error, and you are defendants in error, to show cause of any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 22d day of June, in the year of our Lord one thousand nine hundred and ten.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Due service of the foregoing citation by copy at Omaha, Nebraska, is hereby admitted this 27th day of June, A. D. 1910.

THE UPDIKE GRAIN COMPANY,
NEBRASKA-IOWA GRAIN COMPANY,
CROWELL LUMBER AND GRAIN COMPANY,
By SMYTH & SMITH,
EDWARD P. SMITH,
CONSTANTINE J. SMYTH,
Their Attorneys.

[Endorsed:] No. 3135. Union Pacific Railroad Company, Pl'ff in Error, vs. The Updike Grain Company et al., Def'ts in Error. Citation on Writ of Error. Proceeding as to All Def'ts in Error. The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Co. Filed Jul- 1, 1910. John D. Jordan, Clerk.

(*Petition for Writ of Error as to Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company.*)

And on the eighteenth day of June, A. D. 1910, a petition for writ of error as to Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

Petition for Writ of Error.

Your Petitioner, Union Pacific Railroad Company, Plaintiff in Error in the above entitled cause, respectfully shows that the said cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that certain judgments have been rendered therein on the 18th day of April, 1910, and the 18 day of June, 1910, affirming in part judgments rendered and entered respectively in favor of the Defendant in Error, The Updike Grain Company, and the Defendant in Error, Crowell Lumber & Grain Company, and against the Plaintiff in Error by the Circuit Court of the United States for the District of Nebraska, in which judgment of affirmance and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the Plaintiff in Error, who was also Plaintiff in Error in the United States Circuit Court of Appeals and defendant in the Circuit Court of the United States for the District of Nebraska; that the matter in controversy in the said suit exceeds one thousand dollars, besides costs; that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; that this cause does not arise under the patent laws nor the revenue laws nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and therefore your Petitioner respectfully prays that a Writ of Error be allowed it in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by the Plaintiff in Error may be reviewed, and if error be found, corrected according to the laws and customs of the United States, and also that an order be made fxing the amount of security which the Plaintiff in Error shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in the said United States Circuit Court of Appeals, Eighth Circuit, as between the Plaintiff in Error and the said Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, and of the Circuit Court of the United States for the District of

Nebraska, upon the judgments rendered in favor of the said Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, be suspended and stayed until the determination of the said Writ of Error by the Supreme Court of the United States.

And your petitioner will every pray.

UNION PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*
By F. C. DILLARD,
N. H. LOOMIS,
R. W. BLAIR,
EDSON RICH, &
E. H. CROCKER, *Its Attorneys.*

The foregoing petition is granted and Writ of Error is allowed as prayed for upon the Plaintiff in Error giving bond, according to law, in the sum of $10,000.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 3135. In the United States Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Co., a Corporation, et al., Defendants in Error. Petition for Writ of Error as to Defendants in Error The Updike Grain Co. and Crowell Lumber & Grain Co. Filed Jun- 18, 1910, John D. Jordan, Clerk.

(Assignment of Errors on Writ of Error from Supreme Court U. S. as to Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company.)

And on the eighteenth day of June, A. D. 1910, an assignment of errors on writ of error from the Supreme Court of the United States as to the Defendants in Error The Updike Grain Company and Crowell Lumber & Grain Company was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

Assignment of Errors.

And now comes the Plaintiff in Error, Union Pacific Railroad Company, Defendant in the Circuit Court of the United States for

the District of Nebraska, and Plaintiff in Error in the United States Circuit Court of Appeals, for the Eighth Circuit, and says that there is manifest error in the record and proceedings in the above entitled cause in the Circuit Court of the United States for the District of Nebraska, and likewise in the United States Circuit Court of Appeals, Eighth Circuit, and that the judgments of the said courts, and particularly that of the United States Circuit Court of Appeals, Eighth Circuit, are erroneous and against the just rights of the Plaintiff in Error, and that manifest error has intervened to the prejudice of Union Pacific Railroad Company, Plaintiff in Error, in this, to-wit:

1st. The Plaintiff in Error assigns and reaffirms, the several assignments of error, Numbered 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 17th, 19th, 20th, 21st, and 22nd, filed in the Circuit Court of the United States, District of Nebraska, in the above entitled cause, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, and separately assigns as error on the part of the said United States Circuit Court of Appeals, Eighth Circuit, the action of the said Circuit Court of Appeals, Eighth Circuit, in overruling, except as to the remittiturs, each of the said assignments of error, numbered respectively 1st, 2nd, 3rd, 4th, 5th, 6th, 8th, 9th, 10th, 11th, 12th, 13th, 15th, 16th, 17th, 19th, 20th, 21st and 22nd, said assignments being particularly set out in Assignments of Error Numbered 2nd to 20th, inclusive, of this Assignment of Errors.

2nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the first assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"1st. The verdict is not sustained by sufficient evidence."

3rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the second assignment of error filed in the Circuit Court of the United States for the District of Nebraska and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to wit:

"2nd. The verdict is contrary to law."

4th. The United States Circuit Court of Appeals, Eighth Circuit erred in not sustaining in its entirety the third assignment of error filed in the Circuit Court of the United States for the District of Nebraska and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"3rd. Errors of law occur-ing at the trial and duly excepted to at the time."

5th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fourth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States

Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"4th. The court erred in overruling the defendant's objection to the introduction of any evidence on the part of the plaintiffs on the ground that the petition failed to state a cause of action against the defendant, to which ruling of the court the defendant at the time duly excepted."

6th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fifth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"5th. The Court erred in overruling the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the several plaintiffs, to which ruling of the Court the defendant at the time duly excepted."

7th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the sixth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"6th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant, and against the Updike Grain Company, to which ruling of the court defendant at the time duly excepted."

8th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the Eighth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"8th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the court the defendant at the time duly excepted."

9th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the ninth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"9th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the plaintiffs."

10th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the tenth assignment of

error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"10th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Updike Grain Company, to which ruling of the court the defendant at the time duly excepted."

11th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the eleventh assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"11th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Nebraska-Iowa Grain Company, to which ruling of the Court the defendant at the time duly excepted."

12th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twelfth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"12th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the Crowell Lumber & Grain Company, to which ruling of the court the defendant at the time duly excepted."

13th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the thirteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"13th. The court erred in sustaining the motion made by the plaintiffs, at the close of all the testimony in the case, to direct a verdict in favor of the plaintiffs and against the defendant, to which ruling of the court the defendant at the time duly excepted."

14th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the fifteenth assignment of errors filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"15th. The Court erred in directing the jury to find a verdict in favor of the Crowell Lumber & Grain Company for $698.29, with interest from December 26, 1907, to which action of the court the defendant at the time duly excepted."

15th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the sixteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"16th. The Court erred in directing the jury to find a verdict in favor of the Updike Grain Company for $6742.10, with interest from July 1st, 1907, to which action of the court the defendant at the time duly excepted."

16th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the seventeenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"17th. The Court separately erred in directing the jury to return a verdict in favor of each of the plaintiffs, the Nebraska-Iowa Grain Company, the Crowell Lumber & Grain Company, and the Updike Grain Company, to which action of the court the defendant at the time duly excepted."

17th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the nineteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"19th. The Court erred in ordering, rendering and entering judgment in favor of the Crowell Lumber & Grain Company."

18th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twentieth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"20th. The Court erred in ordering, rendering and entering judgment in favor of the Updike Grain Company."

19th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twenty-first assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"21st. The court erred in instructing the jury in the following words: 'I will cut this matter short and say to you, Gentlemen of the Jury, that the Court will relieve you of responsibility in the matter, so that you need not have any compunctions of conscience, and will direct you to return a verdict for the Nebraska-Iowa Grain Company in the sum of $2509.74, with interest from July 22, 1907; and in favor of the Crowell Lumber and Grain Company find a verdict in their favor for $698.29, with interest from December 26, 1907, and

in the case of The Updike Grain Company for $6742.10, with interest from July 1st, 1907,' to the giving of which instruction the defendant duly excepted at the time and in the presence of the jury."

20th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining, in its entirety, the twenty-second assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"22nd. The Court erred in overruling the motion for a new trial filed by the defendant herein."

21st. The United States Circuit Court of Appeals, Eighth Circuit, separately erred in not sustaining each of the assignments of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, said assignments being particularly set out in Assignments of Error, Nos. 2 to 20th, inclusive, of this Assignment of Errors.

22nd. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur, in entering judgment affirming, to the extent of Six Thousand, Three Hundred and Ten, and 18/100, ($6310.18) and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of The Updike Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on May 14, 1909, in favor of the Defendant in Error, The Updike Grain Company, and against the Plaintiff in Error.

23rd. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur, in entering judgment affirming, to the extent of Three Hundred and Fourteen & 11/100 ($314.11) Dollars and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of the Crowell Lumber & Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, and against the Plaintiff in Error.

24th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed, in entering judgment affirming, to the extent of Six Thousand, Three Hundred and Ten & 18/100, ($6310.18) Dollars and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of The Updike Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on May 14, 1909, in favor of the Defendant in Error, The Updike Grain Company, and against the Plaintiff in Error.

25th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed, in entering judgment affirming, to the extent of Three Hundred and Fourteen & 11/100 ($314.11) Dollars and interest thereon at 6% per annum from July 22, 1907, and the costs of suit of the Crowell Lumber & Grain Company, the judgment of the Circuit Court of the United States for the Dis-

trict of Nebraska entered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, and against the Plaintiff in Error.

26th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering a remittitur of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of the Updike Grain Company, in affirming said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of said The Updike Grain Company.

27th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of The Updike Grain Company, in affirming said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the said The Updike Grain Company.

28th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of the Crowell Lumber & Grain Company, in affirming the said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the Crowell Lumber & Grain Company.

29th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed of part of the judgment of the Circuit Court of the United States for the District of Nebraska, in favor of the Crowell Lumber & Grain Company, in affirming the said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the Crowell Lumber & Grain Company.

30th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment rendered in the Circuit Court of the United States for the District of Nebraska against the Plaintiff in Error and in favor of the Defendant in Error, The Updike Grain Company.

31st. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment rendered in the Circuit Court of the United States for the District of Nebraska against the Plaintiff in Error and in favor of the Crowell Lumber & Grain Company, Defendant in Error.

32nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the United States Circuit Court for the District of Nebraska rendered on the 14th day of May, 1909, in favor of the Defendant in Error, The Updike Grain Company, for the sum of Seven Thousand, Four Hundred and Sixteen & 31/100 ($7,416.31) Dollars and costs of suit against Plaintiff in Error, and in not remanding the said cause to the said Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and said Defendant in Error, The Updike Grain Company.

33rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not absolutely reversing the judgment of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of the Defendant in Error, Nebraska-Iowa Grain Company, for the sum of Two Thousand, Seven Hundred and Sixty & 71/100 ($2,760.71) Dollars and costs of suit against Plaintiff in Error.

34th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, for the sum of Seven Hundred and Fifty-four & 15/100 ($754.15) Dollars and its costs of suit, and in not remanding the said cause to the Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and the said Defendant in Error, Crowell Lumber & Grain Company.

35th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska rendered on the 14th day of May, 1909, in favor of each of the Defendants in Error, The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company against the Plaintiff in Error, and in not remanding the entire cause to the said Circuit Court of the United States for the District of Nebraska for a new trial.

36th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not finding in favor of the Plaintiff in Error upon the record sent to the said United States Circuit Court of Appeals in response to the Writ of Error to the Circuit Court of the United States for the District of Nebraska.

37th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittitur in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgments for the remainder of the amounts found for each of the defendants in error, The Updike Grain Company and Crowell Lumber & Grain Company in the Circuit Court of the United States for the District of Nebraska for the reason that said judgments were founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgments.

38th. The United States Circuit Court of Appeals, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska in favor of the Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgments for the remainder of the amounts found for the Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, and each of them, in the said Circuit Court of the United States for the District of Nebraska, for the reason that said judgments were founded

on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgments.

39th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgment for the remainder of the amount found for the said Defendant in Error, The Updike Grain Company, in the said Circuit Court of the United States for the District of Nebraska, for the reason that such judgment was founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgment.

40th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittitur in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company, and Crowell Lumber & Grain Company, erred in affirming the judgment for the remainder of the amount found for the Defendant in Error, Crowell Lumber & Grain Company, in the said Circuit Court of the United States for the District of Nebraska, for the reason that such judgment was founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgment.

41st. The United States Circuit Court of Appeals, Eighth Circuit, after ordering the remittiturs as shown in the judgment, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amounts found in the said court for and in favor of The Updike Grain Company and Crowell Lumber & Grain Company, and each of them, on the ground that the said Grain Companies were discriminated against by the contract made with F. H. Peavey & Company, and by reason of the amounts paid to F. H. Peavey & Company under the said contract and in accordance with the published tariffs of the Plaintiff in Error, because the said contract and the tariffs issued in pursuance thereof provided for the performance of a transportation service, and the Plaintiff in Error could legally employ whom it would to perform this service without thereby discriminating against others whom it failed to so employ.

42nd. The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, and each of them, insofar as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company to elevate grain, was employing the said companies to perform a service in transportation which it might

itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

43rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of The Updike Grain Company, insofar as the said judgment embraces amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing The Updike Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

44th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of the Nebraska-Iowa Grain Company, insofar as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing the Nebraska-Iowa Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

45th. The United States Circuit Court of Appeals, Eighth Circuit erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of the Crowell Lumber & Grain Company, insofar as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing the Crowell Lumber & Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

46th. The United States Circuit Court of Appeals Eighth Circuit erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for attorneys' fees, which error is fundamental and apparent of record, because such judgment was

based upon an award of the Interstate Commerce Commission, and the failure of the Plaintiff in Error to abide by it, when the law giving the power to such commission to make such award is unconstitutional in that it delegates to such Commission legislative powers and combines in them powers which are executive, legislative and judicial.

47th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for attorneys' fees, which error is fundamental and apparent of record, because to impose upon a carrier the necessity of paying such award if it resists an order of the Commission granting reparation, and is cast in the action on such order, is to deprive it of the equal protection of the laws, and to deprive it of its property without due process of law.

48th. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendants in Error, and each of them to recover upon the theory that the Plaintiff in Error discriminated against the Defendants in Error in paying Peavey & Company, under the contract and tariffs, for the performance of transportation services.

49th. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendant in Error, The Updike Grain Company, to recover upon the theory that the Plaintiff in Error discriminated against the Defendant in Error, The Updike Grain Company, in paying Peavey & Company, under the contract and tariffs, for the performance of transportation services.

50th. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendant in Error, Crowell Lumber & Grain Company, to recover upon the theory that the Plaintiff in Error discriminated against the Defendant in Error, Crowell Lumber & Grain Company, in paying Peavey & Company, under the contract and tariffs, for the performance of transportation services

51st. The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that discrimination against one patron of a railroad company could follow as the result of the full performance of a legal contract made and entered into with another patron of the same railroad company.

52nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing entirely, and in each and every part thereof, and as to each and all the Defendants in Error, the judgment entered by the Circuit Court of the United States for the District of Nebraska on the 14th day of May, 1909, in favor of the Defendants in Error respectively, and against the Plaintiff in Error, and in not remanding the whole cause to the said Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and each and all of the Defendants in Error.

53rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in entering judgment in favor of Defendant in Error, The Updike Grain Company, against Plaintiff in Error for the costs of said Defendant in Error in said Circuit Court of Appeals.

54th. The United States Circuit Court of Appeals, Eighth Circuit, erred in entering judgment in favor of the Defendant in Error, the Crowell Lumber & Grain Company, against Plaintiff in Error for the costs of said Defendant in Error in said Circuit Court of Appeals.

Wherefore the said Union Pacific Railroad Company, Plaintiff in Error, prays that for the errors aforesaid, and other errors appearing in the record of the said United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, to the prejudice of the Plaintiff in Error, the said judgment of the United States Circuit Court of Appeals, Eighth Circuit, insofar as it affirms any part of the judgment entered by the Circuit Court of the United States for the District of Nebraska in favor of the said Defendants in Error, The Updike Grain Company and the Crowell Lumber & Grain Company, or either of them, and renders judgment for costs in said Circuit Court of Appeals in favor of said Defendants in Error, The Updike Grain Company and the Crowell Lumber & Grain Company, or either of them, be reversed, annulled and for naught esteemed, and that the said cause be remanded to the Circuit Court of the United States for the District of Nebraska, Omaha Division, with instructions to grant a new trial in said cause as between the Plaintiff in Error and the said Defendants in Error, The Updike Grain Company and the Crowell Lumber & Grain Company, or for such further proceedings in said cause as may be determined upon by this Honorable Court, to the end that justice may be done in the premises.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

By F. C. DILLARD,
N. H. LOOMIS,
R. W. BLAIR,
EDSON RICH, &
E. H. CROCKER,
Its Attorneys.

(Endorsed:) No. 3135. In the United States Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Co., a Corporation, et al., Defendants in Error. Assignment of Errors filed with Petition for Writ of Error as to Defendants in Error The Updike Grain Co. and Crowell Lumber & Grain Co. Filed Jun. 18, 1910, John D. Jordan, Clerk.

(Supersedeas Bond on Writ of Error from Supreme Court U. S. as to Updike Grain Company and Crowell Lumber and Grain Company.)

And on the twenty-fifth day of June, A. D. 1910, a supersedeas bond on writ of error from the Supreme Court of the United States as to the Updike Grain Company and Crowell Lumber & Grain Company was filed in said cause, in the words and figures following, to-wit:

Bond.

Know all men by these presents:

That we, Union Pacific Railroad Company, as principal, and Luther Drake, as surety, are held and firmly bound unto the Updike Grain Company and Crowell Lumber & Grain Company, in the just sum of Ten thousand ($10,000) Dollars, to be paid to the said The Updike Grain Company, and Crowell Lumber & Grain Company, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals this 18th day of June, in the year of our Lord, One thousand, Nine hundred and Ten.

Whereas, lately at a session of the United States Circuit Court of Appeals Eighth Circuit, in a suit depending in said court between Union Pacific Railroad Company, Plaintiff in Error, and The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, defendants in Error, judgment was rendered against said Union Pacific Railroad Company and in favor of said Updike Grain Company and Crowell Lumber & Grain Company, and said Union Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said The Updike Grain Company, and Crowell Lumber & Grain Company, Defendants in Error, citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 21st day of July next.

Now the condition of the above obligation is such that if the said Union Pacific Railroad Company shall prosecute said Writ of Error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] UNION PACIFIC RAILROAD COMPANY, *Principal,*
By A. L. MOHLER, *Vice Pres't.*
LUTHER DRAKE, *Surety.* [SEAL.]

Attest:
ALEX. MILLAR, *Secretary.*

Sealed and delivered in the presence of:
E. H. CROCKER.

Approved to operate as a supersedeas by

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

STATE OF NEBRASKA,
County of Douglas, ss:

Luther Drake, being first duly sworn, deposes and says that he is the surety named in the foregoing bond; that he is a resident of the County of Douglas, State of Nebraska; and a property holder therein; that he is worth the sum of Twenty Thousand ($20,000) Dollars over and above all his debts and liabilities, and exclusive of property by law exempt from levy and sale on execution.

LUTHER DRAKE.

Subscribed in my presence and sworn to before me this 18th day of June, A. D., 1910.

[SEAL.] F. C. BULLOCK,
Notary Public.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, George H. Thummel, Clerk for the Circuit Court of the United States for the District of Nebraska, do hereby certify that Luther Drake, surety in the foregoing bond is personally known to me; that he is worth more than double the amount of said bond; and if the said bond was presented to me for approval I would approve the same without hesitancy.

Witness my hand and the seal of said Court at Omaha, in said District, this 18th day of June, A. D. 1910.

[SEAL.] GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska.

(Endorsed:) No. 3135. U. S. Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Co., Pl'ff in Error, vs. The Updike Grain Company, et al. Supersedeas Bond on Writ of Error as to Updike Grain Company and Crowell Lumber and Grain Company. Filed Jun- 25, 1910, John D. Jordan, Clerk.

(*Writ of Error from the Supreme Court of the* Supreme Court of the *United States as to the Updike Grain Company and Crowell Lumber & Grain Company.*)

And on the twenty-fifth day of June, A. D. 1910, a writ of error from the Supreme Court of the United States as to The Updike Grain Company and the Crowell Lumber & Grain Company was filed in said cause, the original of which with the Clerk's return endorsed thereon is hereto attached and herewith returned:

(*Writ of Error.*)

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition in favor of The Updike Grain Company and the Crowell Lumber & Grain Company of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Union Pacific Railroad Company, plaintiff in error, and The Updike Grain Company, a corporation, Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment in favor of The Updike Grain Company and the Crowell Lumber & Grain Company be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22d day of June in the year of our Lord one thousand nine hundred and ten.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of July, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] No. 3135. U. S. Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, vs. The Updike Grain Company et al. Writ of Error from the Supreme Court of the United States as to the Updike Grain Company and Crowell Lumber and Grain Company. Filed Jun- 25, 1910. John D. Jordan, Clerk.

(*Citation on Writ of Error from Supreme Court of the United States as to The Updike Grain Company and Crowell Lumber and Grain Company.*)

And on the first day of July, A. D. 1910, a citation on writ of error from the Supreme Court of the United States as to The Updike Grain Company and the Crowell Lumber & Grain Company was filed in said cause, the original of which with the admission of service endorsed thereon is hereto attached and herewith returned:

Citation.

UNITED STATES OF AMERICA, *ss:*

To The Updike Grain Company and Crowell Lumber & Grain Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Union Pacific Railroad Company is plaintiff in error, and you are defendants in error, to show cause if any there be, why the judgment rendered in your favor and against the said plaintiff in error, in a cause depending in said United States Circuit Court of Appeals between Union Pacific Railroad Company, plaintiff in error, and The Updike Grain Company, a corporation, Nebraska Iowa Grain Company, a corporation and the Crowell Lumber & Grain Company, a corporation, defendants in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William R. Day Associate Justice of the

Supreme Court of the United States, this 22d day of June, in the year of our Lord one thousand nine hundred and ten.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Due service of the foregoing citation by copy at Omaha, Nebraska, is hereby admitted this 27th day of June, A. D. 1910.

THE UPDIKE GRAIN COMPANY,
CROWELL LUMBER AND GRAIN COMPANY,
By SMYTH & SMITH.
CONSTANTINE J. SMYTH,
EDWARD P. SMITH, *Their Attorneys.*

[Endorsed:] No. 3135. Union Pacific Railroad Company, Pl'ff in Error, vs. The Updike Grain Company et al., Def'ts in Error. Citation in Writ of Error Proceedings as to Def'ts in Error, The Updike Grain Company and Crowell Lumber & Grain Company. Filed Jul- 1, 1910. John D. Jordan, Clerk.

(*Petition for Writ of Error as to Defendant in Error, The Updike Grain Company.*)

And on the eighteenth day of June, A. D. 1910, a petition for writ of error as to the Defendant in Error The Updike Grain Company was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

Petition for Writ of Error.

Your Petitioner, Union Pacific Railroad Company, Plaintiff in Error in the above entitled cause, respectfully shows that the said cause is now pending in the United States Circuit Court of Appeals for the Eighth Circuit, and that judgment has therein been rendered and entered on the 18th day of April, 1910, and the 18th day of June, 1910, in part affirming the judgment of the Circuit Court of the United States for the District of Nebraska, Omaha Division, rendered in favor of The Updike Grain Company, one of the Defendants in Error in the United States Circuit Court of Appeals for

the Eighth Circuit, and one of the Plaintiffs in the Circuit Court of the United States for the District of Nebraska, and against your Petitioner, Union Pacific Railroad Company, Defendant in said cause in the Circuit Court of the United States for the District of Nebraska and Plaintiff in Error in the United States Circuit Court of Appeals for the Eighth Circuit; that in said judgment of affirmance by the United States Circuit Court of Appeals, Eighth Circuit, and in the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the Plaintiff in Error; that the matter in controversy in said suit exceeds one thousand dollars, besides costs; that the jurisdiction of none of the courts above mentioned is or was dependent in any wise upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different States; that this cause does not arise under the patent laws, nor the revenue laws nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, and therefore your petitioner respectfully prays that a Writ of Error be allowed it in the above entitled cause directing the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by the Plaintiff in Error may be reviewed, and if error be found, corrected according to the laws and customs of the United States, and also that an order be made fixing the amount of security which the Plaintiff in Error shall give and furnish upon said Writ of Error, and that upon the giving of such security all further proceedings in the said United States Circuit Court of Appeals, Eighth Circuit, as between the Plaintiff in Error, and the said Defendant in Error, The Updike Grain Company, and of the Circuit Court of the United States for the District of Nebraska, upon the judgment rendered in favor of the said Defendant in Error, The Updike Grain Company, be suspended and stayed until the determination of the said Writ of Error by the Supreme Court of the United States.

And your petitioner will ever pray.

UNION PACIFIC RAILROAD COMPANY, *Plaintiff in Error,*

By F. C. DILLARD,
R. W. BLAIR,
N. H. LOOMIS,
EDSON RICH, &
E. H. CROCKER, *Its Attorneys.*

The foregoing petition is granted and Writ of Error is allowed as prayed for upon the Plaintiff in Error giving bond, according to law in the sum of $10,000.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) No. 3135. In the United States Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Co., a corporation, et al., Defendants in Error. Petition for Writ of Error as to Defendant in Error The Updike Grain Co. Filed Jun- 18, 1910. John D. Jordan, Clerk.

(*Assignment of Errors on Writ of Error from Supreme Court of the United States as to the Defendant in Error, The Updike Grain Company.*)

And on the eighteenth day of June, A. D. 1910, an assignment of errors on writ of error from the Supreme Court of the United States as to the defendant in error The Updike Grain Company was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

Assignment of Errors.

And now comes the Plaintiff in Error, Union Pacific Railroad Company, Defendant in the Circuit Court of the United States for the District of Nebraska, and Plaintiff in Error in the United States Circuit Court of Appeals, Eighth Circuit, and says that there is manifest error in the record and proceedings in the above entitled cause in the Circuit Court of the United States for the District of Nebraska, and likewise in the United States Circuit Court of Appeals, Eighth Circuit, and that the judgments of the said courts, and particularly that of the United States Circuit Court of Appeals, Eighth Circuit, are erroneous and against the just rights of the Plaintiff in Error, and that manifest error has intervened to the prejudice of Union Pacific Railroad Company, Plaintiff in Error, in this, to-wit:

1st. The Plaintiff in Error assigns and reaffirms the several assignments of error set out in the Assignment of Errors filed in the Circuit Court of the United States, District of Nebraska, in the above entitled cause, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, and separately assigns as error on the part of the said United States Circuit Court of Appeals, Eighth Circuit, the action of the said court in overruling, except as to the remittiturs ordered, each of the said Assignments of Error, said assignments being particularly set out in Assignments of Error Nos. 1st, 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 13th, 16th, 17th, 20th, 21st and 22nd of this Assignment of Errors.

2nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the first assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"1st. The verdict is not sustained by sufficient evidence."

3rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the second assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"2nd. The verdict is contrary to law."

4th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the third assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"3rd. Errors of law occur-ing at the trial and duly excepted to at the time."

5th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the fourth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"4th. The Court erred in overruling the defendant's objection to the introduction of any evidence on the part of the plaintiffs on the ground that the petition failed to state a cause of action against the defendant, to which ruling of the court the defendant at the time duly excepted."

6th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the fifth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"5th. The Court erred in overruling the defendant's motion, made at the close of the plaintiffs' testimony, to direct a verdict in favor of the defendant and against the several plaintiffs, to which ruling of the Court the defendant at the time duly excepted."

7th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the sixth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"6th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of the plaintiffs' testimony,

to direct a verdict in favor of the defendant and against The Updike Grain Company, to which ruling of the Court the defendant at the time duly excepted."

8th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the ninth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"9th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against the plaintiffs."

9th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the tenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"10th. The Court separately erred in overruling each ground of the defendant's motion, made at the close of all the testimony in the case, to direct a verdict in favor of the defendant and against The Updike Grain Company, to which ruling of the court the defendant at the time duly excepted."

10th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the thirteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"13th. The Court erred in sustaining the motion made by the plaintiffs, at the close of all the testimony in the case, to direct a verdict in favor of the plaintiffs and against the defendant, to which ruling of the Court the defendant at the time duly excepted."

11th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the sixteenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"16th. The Court erred in directing the jury to find a verdict in favor of The Updike Grain Company for $6742.10, with interest from July 1st, 1907, to which action of the court the defendant at the time duly excepted."

12th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the seventeenth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows to-wit:

"17th. The Court separately erred in directing the jury to re-

turn a verdict in favor of each of the plaintiffs, the Nebraska-Iowa Grain Company, the Crowell Lumber & Grain Company, and the Updike Grain Company, to which action of the court the defendant at the time duly excepted."

13th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the twentieth assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"20th. The Court erred in ordering, rendering and entering judgment in favor of The Updike Grain Company."

14th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the twenty-first assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"21st. The Court erred in instructing the jury in the following words: 'I will cut this matter short and say to you, Gentlemen of the Jury, that the Court will relieve you of responsibility in the matter, so that you will need not have any compunctions of conscience, and will direct you to return a verdict for the Nebraska-Iowa Grain Company in the sum of $2509.74, with interest from July 22, 1907; and in favor of the Crowell Lumber & Grain Company find a verdict in their favor for $698.29, with interest from December 26, 1907, and in the case of The Updike Grain Company for $6742.10, with interest from July 1st, 1907' to the giving of which instruction the defendant duly excepted at the time and in the presence of the jury."

15th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not sustaining in its entirety the twenty-second assignment of error filed in the Circuit Court of the United States for the District of Nebraska, and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, which said assignment of error is as follows, to-wit:

"22nd. The Court erred in overruling the motion for a new trial filed by the defendant herein."

16th. The United States Circuit Court of Appeals, Eighth Circuit, separately erred in not sustaining each of the assignments of error, numbered 1st, 2nd, 3rd, 4th, 5th, 6th, 9th, 10th, 13th, 16th, 17th, 20th, 21st, and 22nd, filed in the Circuit Court of the United States for the District of Nebraska and forming a part of the record in the United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, said assignments being particularly set out in Assignments of Error, Nos. 2 to 15, inclusive, of this Assignment of Errors.

17th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering remittitur, in entering judgment affirming, to the extent of Six Thousand, Three Hundred and Ten, and

18/100 ($6310.18) Dollars, and interest thereon at six per cent per annum from July 22, 1907, and the costs of suit of The Updike Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska, entered on May 14, 1909, in favor of the Defendant in Error, The Updike Grain Company, and against the Plaintiff in Error.

18th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed, in entering judgment affirming, to the extent of Six Thousand, Three Hundred and Ten & 18/100 ($6310.18) Dollars and interest thereon at six per cent per annum from July 22nd, 1907, and the costs of suit of The Updike Grain Company, the judgment of the Circuit Court of the United States for the District of Nebraska entered on May 14, 1909, in favor of the defendant in error, The Updike Grain Company, and against the Plaintiff in Error.

19th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after ordering a remittitur of part of the judgment of the Circuit Court of the United States for the District of Nebraska in favor of The Updike Grain Company, in affirming the said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of said The Updike Grain Company.

20th. The United States Circuit Court of Appeals, Eighth Circuit, erred, after remittitur had been filed of part of the judgment of the Circuit Court of the United States for the District of Nebraska, in favor of The Updike Grain Company, in affirming the said judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amount in favor of the said The Updike Grain Company.

21st. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment rendered in the Circuit Court of the United States for the District of Nebraska, against the Plaintiff in Error and in favor of the Defendant in Error, The Updike Grain Company.

22nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the United States Circuit Court for the District of Nebraska rendered on the 14th day of May, 1909, in favor of the Defendant in Error, The Updike Grain Company, for the sum of Seven Thousand, Four Hundred and Sixteen & 31/100 ($7,416.31) Dollars, and costs of suit against Plaintiff in Error, and in not remanding the said cause to the said Circuit Court of the United States for the District of Nebraska, for a new trial as between the Plaintiff in Error and the Defendant in Error, The Updike Grain Company.

23rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not absolutely reversing the judgment of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of the Defendant in Error, Nebraska-Iowa Grain Company, for the sum of Two Thousand, Seven Hundred and Sixty & 71/100 ($2760.71) Dollars and costs of suit against Plaintiff in Error.

24th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of the Defendant in Error, Crowell Lumber & Grain Company, for the sum of Seven Hundred and Fifty-Four & 15/100 ($754.15) Dollars and its costs of suit, and in not remanding the said cause to the Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and the said Defendant in Error, Crowell Lumber & Grain Company.

25th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgments of the Circuit Court of the United States for the District of Nebraska, rendered on the 14th day of May, 1909, in favor of each of the Defendants in Error, The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company against the Plaintiff in Error, and in not remanding the entire cause to the said Circuit Court of the United States for the District of Nebraska for a new trial.

26th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not finding in favor of the Plaintiff in Error upon the record sent to the said United States Circuit Court of Appeals in response to the Writ of Error to the Circuit Court of the United States for the District of Nebraska.

27th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company, and Crowell Lumber & Grain Company, erred in affirming the judgments for the remainder of the amounts found for each of the defendants in error, The Updike Grain Company, and Crowell Lumber & Grain Company, in the Circuit Court of the United States for the District of Nebraska, for the reason that the said judgments were founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgments.

28th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska in favor of the Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, erred in affirming the judgments for the remainder of the amounts found for the Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, and each of them, in the said Circuit Court of the United States for the District of Nebraska, for the reason that said judgments were founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgments.

29th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering remittiturs in the judgments rendered in the Circuit Court of the United States for the District of Nebraska on behalf of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, erred in affirming the

judgment for the remainder of the amount found for the Defendant in Error, the Updike Grain Company, in the said Circuit Court of the United States for the District of Nebraska, for the reason that such judgment was founded on rules and practices which were unlawful and found so to be by the Interstate Commerce Commission, and which, therefore, could furnish no basis for the judgment.

30th. The United States Circuit Court of Appeals, Eighth Circuit, after ordering the remittiturs as shown in the judgment, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for the remainder of the amounts found in the said court for and in favor of The Updike Grain Company and Crowell Lumber & Grain Company, and each of them, on the ground that the said Grain Companies were discriminated against by the contract made with F. H. Peavey & Company, and by reason of the amounts paid to F. H. Peavey & Company, under the said contract and in accordance with the published tariffs of the Plaintiff in Error, because the said contract and the tariffs issued in pursuance thereof provided for the performance of a transportation service, and the Plaintiff in Error could legally employ who, it would to perform this service without thereby discriminating against others whom it failed to so employ.

31st. The United States Circuit Court of Appeals erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, and each of them, insofar as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing The Updike Grain Company, Nebraska-Iowa Grain Company, and Crowell Lumber & Grain Company to elevate grain, was employing the said companies to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service, it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

32nd. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska entered in favor of The Updike Grain Company, insofar as the said judgment embraces amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing The Updike Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

33rd. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing the judgment of the Circuit Court of the United States for the District of Nebraska, entered in favor of the Nebraska-Iowa Grain Company, insofar as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing the Nebraska-Iowa Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing such service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

34th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska, entered in favor of the Crowell Lumber & Grain Company, insofar as the said judgment embraced amounts allowed for cars which were not returned to the Union Pacific Railroad Company in accordance with its published tariffs, because the Union Pacific Railroad Company, in employing the Crowell Lumber & Grain Company to elevate grain, was employing the said company to perform a service in transportation which it might itself do or employ another to do, and in so employing another to perform such service it could lawfully stipulate the terms of such employment, and the one performing the service could recover only when such service was performed in accordance with such stipulation duly made and published in the tariffs.

35th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for attorneys' fees, which error is fundamental and apparent of record, because such judgment was based upon an award of the Interstate Commerce Commission, and the failure of the Plaintiff in Error to abide by it, when the law giving the power to such Commission to make such award is unconstitutional in that it delegates to such Commission legislative powers and combines in them powers which are executive, legislative and judicial.

36th. The United States Circuit Court of Appeals, Eighth Circuit, erred in affirming the judgment of the Circuit Court of the United States for the District of Nebraska for attorneys' fees, which error is fundamental and apparent of record, because to impose upon a carrier the necessity of paying such award if it resists an order of the Commission granting reparation, and is cast in the action on such order, is to deprive it of the equal protection of the law, and to deprive it of its property without due process of law.

37th. The United States Circuit Court of Appeals, Eighth Circuit, erred in basing the right of the Defendants in Error, and each of them to recover upon the theory that the Plaintiff in Error discriminated against the Defendants in Error in paying Peavey &

Company, under the contracts and tariffs, for the performance of transportation services.

38th. The United States Circuit Court of Appeals, Eighth Circuit, erred in holding that discrimination against one patron of a railroad company could follow as a result of the full performance of a legal contract made and entered into with another patron of the same railroad company.

39th. The United States Circuit Court of Appeals, Eighth Circuit, erred in not reversing entirely, and in each and every part thereof, and as to each and all the Defendants in Error, the Updike Grain Company, the Nebraska-Iowa Grain Company, and the Crowell Lumber & Grain Company, the judgments entered by the Circuit Court of the United States for the District of Nebraska on the 14th day of May, A. D., 1909, in favor of the said Defendants in Error respectively, and against the Plaintiff in Error, and in not remanding the whole cause to the said Circuit Court of the United States for the District of Nebraska for a new trial as between the Plaintiff in Error and each and all of the said Defendants in Error in said Circuit Court of Appeals.

40th. The said United States Circuit Court of Appeals, Eighth Circuit, erred in entering judgment in favor of the Defendant in Error, The Updike Grain Company, against Plaintiff in Error, for the costs of said Defendant in Error in said Circuit Court of Appeals.

Wherefore the said Union Pacific Railroad Company, Plaintiff in Error, prays that for the errors aforesaid, and other errors appearing in the record of the said United States Circuit Court of Appeals, Eighth Circuit, in the above entitled cause, to the prejudice of the Plaintiff in Error, the said judgment of the United States Circuit Court of Appeals, Eighth Circuit, insofar as it affirms any part of the judgment entered by the Circuit Court of the United States for the District of Nebraska in favor of the said Defendant in Error, The Updike Grain Company, and renders judgment for costs in favor of said Defendant in Error, The Updike Grain Company, be reversed, annulled and for naught esteemed, and that the said cause be remanded to the Circuit Court of the United States for the District of Nebraska, Omaha Division, with instructions to grant a new trial in said cause as between the Plaintiff in Error and the said Defendant in Error, The Updike Grain Company, or for such further proceedings in the said cause as may be determined upon by this Honorable Court to the end that justice may be done in the premises.

UNION PACIFIC RAILROAD COMPANY, *Plaintiff in Error.*

By F. C. DILLARD,
R. W. BLAIR,
N. H. LOOMIS,
EDSON RICH, &
E. H. CROCKER, *Its Attorneys.*

(Endorsed:) No. 3135. In the United States Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Co., a corporation, et al., Defendants in Error. Assignment of Errors filed with Petition for Writ of Error as to Defendant in Error The Updike Grain Co. Filed Jun- 18, 1910, John D. Jordan, Clerk.

(Supersedeas Bond on Writ of Error from Supreme Court of the United States as to The Updike Grain Company.)

And on the twenty-fifth day of June, A. D. 1910, a supersedeas bond on writ of error from the Supreme Court of the United States as to The Updike Grain Company was filed in said cause, in the words and figures following, to-wit:

Bond.

Know all Men by These Presents:

That we, Union Pacific Railroad Company, as principal, and Luther Drake, as surety, are held and firmly bound unto the Updike Grain Company, in the just sum of Ten thousand dollars, ($10,000) to be paid to the said The Updike Grain Company, their certain attorneys, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals this 18th day of June, in the year of our Lord, One thousand, Nine Hundred and Ten.

Whereas lately, at a session of the United States Circuit Court of Appeals, Eighth Circuit, in a suit depending in said court between Union Pacific Railroad Company, Plaintiff in Error, and The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company, defendants in error, judgment was rendered against said Union Pacific Railroad Company, and in favor of said Updike Grain Company and Crowell Lumber & Grain Company, and said Union Pacific Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said court to reverse the said judgment in the aforesaid suit, and a citation directed to the said The Updike Grain Company, Defendant in Error, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 21st day of July next.

Now the condition of the above obligation is such that if the said Union Pacific Railroad Company shall prosecute said Writ of Error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] UNION PACIFIC RAILROAD COMPANY, *Principal.*

By A. L. MOHLER, *Vice Pres't.* [SEAL.]

LUTHER DRAKE, *Surety.*

Attest:

ALEX. MILLAR, *Secretary.*

Sealed and delivered in the presence of:
E. H. CROCKER.

Approved to operate as a supersedeas by

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

STATE OF NEBRASKA,
County of Douglas, ss:

Luther Drake being first duly sworn, deposes and says that he is the surety named in the foregoing bond; that he is a resident of the County of Douglas, State of Nebraska, and a property holder therein; that he is worth the sum of Twenty thousand ($20,000) Dollars over and above all his debts and liabilities, and exclusive of property by law exempt from levy and sale on execution.

LUTHER DRAKE.

Subscribed in my presence and sworn to before me this 18th day of June, A. D. 1910.

[SEAL.]

F. C. BULLOCK,
Notary Public Within and For Douglas County, Nebraska.

My commission expires Dec. 1, 1912.

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, George H. Thummel, Clerk of the Circuit Court of the United States for the District of Nebraska, do hereby certify that Luther Drake surety in the foregoing bond is personally known to me; that he is worth more than double the amount of said bond; and if the said bond was presented to me for approval I would approve the same without hesitancy.

Witness my hand and the seal of said Court at Omaha, in said District, this 18th day of June, A. D. 1910.

[SEAL.]

GEO. H. THUMMEL,
Clerk of the Circuit Court of the United States for the District of Nebraska.

(Endorsed:) No. 3135. U. S. Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Co., Pl'ff in Error, vs. Updike Grain Company, et al. Supersedeas Bond on Writ of Error as to Updike Grain Company. Filed June 25, 1910. John D. Jordan, Clerk.

(*Writ of Error from Supreme Court of the United States as to the Updike Grain Company.*)

And on the twenty-fifth day of June, A. D. 1910, a writ of error from the Supreme Court of the United States as to the Updike Grain Company was filed in said cause, the original of which with the

Clerk's return endorsed thereon is hereto attached and herewith returned:

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition in favor of The Updike Grain Company of the judgment of a plea which is in the said Circuit Court of Appeals before you, or some of you, between Union Pacific Railroad Company, plaintiff in error, and the Updike Grain Company, a corporation, Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, defendants in error, a manifest error hath happened, to the great damage of the said plaintiff in error — by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment in favor of The Updike Grain Company be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22d day of June in the year of our Lord one thousand nine hundred and ten.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Return to Writ.

UNITED STATES OF AMERICA,
Eighth Circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of the United States Circuit of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of July, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

[Endorsed:] No. 3135. U. S. Circuit Court of Appeals, Eighth Circuit. Union Pacific Railroad Company, Plaintiff in Error, vs. The Updike Grain Company et al. Writ of Error from the Supreme Court of the United States as to the Updike Grain Company, alone. Filed Jun- 25, 1910. John D. Jordan, Clerk.

(*Citation on Writ of Error from Supreme Court of the United States as to The Updike Grain Company.*)

And on the first day of July, A. D. 1910, a citation on writ of error from the Supreme Court of the United States was filed in said cause, the original of which with admission of service endorsed thereon is hereto attached and herewith returned:

Citation.

UNITED STATES OF AMERICA, *ss:*

To The Updike Grain Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein the Union Pacific Railroad Company is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment rendered in your favor and against the said plaintiff in error, in a cause depending in said United States Circuit Court of Appeals between Union Pacific Railroad Company, plaintiff in error, and The Updike Grain Company, a corporation, Nebraska-Iowa Grain Company, a corporation, and the Crowell Lumber & Grain Company, a corporation, defendants in error, as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, this 22d day of June, in the year of our Lord one thousand nine hundred and ten.

WILLIAM R. DAY,
Associate Justice of the Supreme Court of the United States.

Due service of the foregoing citation by copy at Omaha, Nebraska, is hereby admitted this 27th day of June, A. D., 1910.

THE UPDIKE GRAIN COMPANY,
By SMYTH & SMITH,
CONSTANTINE J. SMYTH,
EDWARD P. SMITH, *Its Attorneys.*

[Endorsed:] No. 3135. Union Pacific Railroad Company, Pl'ff in Error, vs. The Updike Grain Company et al., Def'ts in Error. Citation in Writ of Error Proceeding as to the Def't in Error, The Updike Grain Company. Filed Jul- 1, 1910. John D. Jordan, Clerk.

(*Stipulation as to Transcript of Record on Writs of Error.*)

And on the fifteenth day of July, A. D. 1910, a stipulation as to transcript of record on writs of error was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 3135.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, a Corporation; NEBRASKA-IOWA Grain Company, a Corporation, and Crowell Lumber & Grain Company, a Corporation, Defendants in Error.

No. 3136.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, Defendant in Error.

Stipulation.

Union Pacific Railroad Company, the Plaintiff in Error in each of the above causes, having sued out writs of error as follows: One as against all defendants in error, one as against Defendants in Error, The Updike Grain Company and Crowell Lumber & Grain Company, and one as against Defendant in Error, The Updike Grain Company alone, in said cause No. 3135; and one as against Defendant in Error, The Updike Grain Company in said cause No. 3136:

And whereas, by stipulation of the parties to the said causes in the United States Circuit Court of Appeals, Eighth Circuit, the record in said cause No. 3135 was made a part of the record in said cause No. 3136 in the said United States Circuit Court of Appeals;

And whereas, it further appears that separate transcripts of that part of the record that was printed in said United States Circuit Court of Appeals in said respective causes Nos. 3135 and 3136 will be unnecessary for the prosecution of each of the said several writs of error in the Supreme Court of the United States.

It is therefore stipulated by and between counsel for the several parties to each of said causes, and to each of said separate error proceedings from said Supreme Court of the United States, that the Clerk of the United States Circuit Court of Appeals, Eighth Circuit, shall transmit to the Supreme Court of the United States, as a part of his transcripts of the record, but one copy of so much of said record as was printed in said United States Circuit Court of Appeals in each of said causes Nos. 3135 and 3136 therein, and that the part so printed in cause No. 3135 of the said Circuit Court of Appeals and included in one of the said transcripts, shall be considered in the Supreme Court of the United States as a part of the record in each of the separate causes and error proceedings in which writs of error have been sued out from said Supreme Court of the United States to said Circuit Court of Appeals in each and both of said causes Nos. 3135 and 3136 of said Circuit Court of Appeals, and that the separate printed record in the case of Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Company, Defendant in Error, No. 3136 of said Circuit Court of Appeals, shall be considered as a further and additional part of the record in the Supreme Court of the United States in the error proceeding in which writ of error has been sued out from said Supreme Court in said cause No. 3136 of said Circuit Court of Appeals.

This stipulation shall be signed in duplicate and filed in each of said causes Nos. 3135 and 3136 in said Circuit Court of Appeals, and copies thereof included in each of the transcripts to be sent by the Clerk of said United States Circuit Court of Appeals to the Supreme Court of the United States.

Dated at Omaha, Neb., this 14th day of July, 1910.

NELSON H. LOOMIS,
EDSON RICH,
F. C. DILLARD,
R. W. BLAIR, &
E. H. CROCKER,

Attorneys for Plaintiff in Error in Each of the Above Entitled Causes and in Each of the Error Proceedings in the Supreme Court of the United States.

SMYTH & SMITH,
C. J. SMYTH,
ED. P. SMITH,

Attorneys for Defendants in Error in Each of the Above Entitled Causes and in Each of the Error Proceedings in the Supreme Court of the United States.

(Endorsed:) In the United States Circuit Court of Appeals, Eighth Circuit. No. 3135. Union Pacific Railroad Company, Plaintiff in Error, v. The Updike Grain Company, a corporation; Nebraska-Iowa Grain Company, a corporation; and Crowell Lumber & Grain Company, a corporation, Defendants in Error. Stipulation as to Transcript on Writs of Error. Filed Jul- 15, 1910. John D. Jordan, Clerk.

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein the Union Pacific Railroad Company is Plaintiff in Error and The Updike Grain Company, the Nebraska-Iowa Grain Company and the Crowell Lumber & Grain Company are Defendants in Error, No. 3135, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the three original writs of error with the Clerk's returns thereto and the three original citations with admissions of service endorsed thereon are hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fifteenth day of July, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

In the Supreme Court of the United States.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, and CROWELL LUMBER & GRAIN COMPANY.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY, and CROWELL LUMBER & GRAIN COMPANY.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error,
v.
THE UPDIKE GRAIN COMPANY.

Stipulation.

Whereas, the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit has certified to this court, in response to the three separate writs of error sued out of this Court to said United States Circuit Court of Appeals to review proceedings in Cause No. 3135 of the said Circuit Court of Appeals, one transcript of the record in said cause, and

Whereas separate transcripts of the record are deemed unnecessary for the prosecution of each of said three separate error proceedings.

It is hereby stipulated and agreed between the parties to each of the said error proceedings in this court that said one transcript so certified by the said Clerk of the United States Circuit Court of Appeals, Eighth Circuit, be filed in each of the said three error proceedings in this court.

Dated at Omaha, Nebraska, this 16th day of July, 1910.

CLAXWELL EVARTS,
N. H. LOOMIS,
Attorneys for Plaintiff in Error in Each of Said Three Error Proceedings.
SMYTH, SMITH & SCHAU,
CONSTANTINE J. SMYTH,
EDWARD P. SMITH,
Attorneys for Defendants in Error in Each of Said Three Error Proceedings.

Endorsed on cover: File No. 22,264. U. S. circuit court of appeals, 8th Circuit. Term No. 643. Union Pacific Railroad Company, plaintiff in error, vs. The Updike Grain Company, Nebraska-Iowa Grain Company and Crowell Lumber & Grain Company. File No. 22,265. Term No. 644. Union Pacific Railroad Company, plaintiff in error, vs. The Updike Grain Company, and Crowell Lumber & Grain Company. File No. 22,266. Term No. 645. Union Pacific Railroad Company, plaintiff in error, vs. The Updike Grain Company. Filed July 19th, 1910. File Nos. 22,264, 22,265, and 22,266.

353-354-355-356

Office Supreme Court, U. S.
FILED.
APR 25 1911
JAMES H. McKENNEY,
CLERK.

~~Nos. 643, 644, 645 and 646.~~

Supreme Court of the United States.

OCTOBER TERM, 1910.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE UPDIKE GRAIN COMPANY AND OTHERS.

(Four Causes.)

MOTION TO ADVANCE.

MAXWELL EVARTS,
Of Counsel for Plaintiff in Error.

C. G. BURGOYNE, 72 to 78 Spring Street, New York.

Supreme Court of the United States,

OCTOBER TERM 1910.

UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY and CROWELL LUMBER & GRAIN COMPANY.	643
UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. THE UPDIKE GRAIN COMPANY and CROWELL LUMBER COMPANY.	644
UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. THE UPDIKE GRAIN COMPANY.	645
UNION PACIFIC RAILROAD COMPANY, Plaintiff in Error, vs. THE UPDIKE GRAIN COMPANY.	646

On Writs of Error to the United States Circuit Court of Appeals for the Eighth Circuit.

Motion to Advance.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Union Pacific Railroad Company, plaintiff in error, respectfully moves the Court to advance the four above-entitled causes to be heard on October 10, 1911, with causes Nos. 554, 555 and 556, for the following reasons:

Nos. 554, 555 and 556 have been advanced by the Court on motion of the Solicitor General to be heard on October 10, 1911. Said causes are appeals by the Interstate Commerce Commission and Union Pacific Railroad Company from final decrees of the Circuit Court of the United States for the Western District of Missouri and involve the validity of orders of the Interstate Commerce Commission entered June 29, 1908, requiring carriers to cease and desist from paying so-called elevation allowances on grain in transit. The decisions of the Commission involved in those causes were to the effect that the practice of carriers to grant elevation allowances was illegal because of its inherent tendency to result in preferences and discriminations (14 I. C. C. R. 316, 317). One of the elevator companies affected by these decisions was Peavey & Company, appellee in No. 556.

The tariffs of the Union Pacific Railroad Company provide for grain elevation allowances under certain specified conditions. Under the terms and conditions of the tariffs these allowances were available to Peavey & Company and other parties similarly situated but were not available to the defendants in error in causes Nos. 643, 644, 645 and 646. Upon complaint of the defendants in error the Interstate Commerce Commission held that an undue discrimination existed against the defendants in error and made its order awarding them reparation in substantial amounts. The defendants in error brought suit in the Circuit Court of the United States for the District of Nebraska to enforce the payment of the reparation awards and a verdict was directed in their favor. The judgment of the Circuit Court has been affirmed (with certain modifications as to amounts) by the Circuit Court of Appeals for the Eighth Circuit. The validity of the awards was challenged by the plaintiff in error on the ground that, upon the reasoning and principles which resulted in the Commission's orders (involved in Nos. 554, 555 and 556) declaring all such allowances illegal, such awards, constituting as they do allowances for grain elevation, are illegal. In other words, the plaintiff in error argues that if

the elevation allowances to Peavey & Company were illegal the Railroad Company could not lawfully make the same allowances to the defendants in error whether voluntarily or in satisfaction of reparation awards.

The Commission's orders of June 29, 1908, were attacked by Peavey & Company and other parties by suit in the Circuit Court for the Western District of Missouri and after hearing by three Circuit Judges of the Eighth Circuit the operation of the Commission's orders was enjoined. The appeals from that decision are causes Nos. 554, 555 and 556 in this Court. The writs of error sued out by the Union Pacific Railroad Company to review the judgment in the reparation cases in favor of the Updike Grain Company and others were heard in the Circuit Court of Appeals for the Eighth Circuit by two of the Circuit Judges who had decided the injunction suits above mentioned. Their decision in the injunction cases that the elevation allowances were legal required them to reach the same conclusion in the reparation cases and to hold that the orders of the Commission declaring the allowances illegal and the reasoning resulting in those orders constituted no defense to the reparation claims in these cases.

The questions which will be presented to this Court in causes Nos. 643, 644, 645 and 646 are therefore similar to the questions presented by Nos. 554, 555 and 556, and the convenience of the Court and of the parties will be subserved by the advancement of all the related causes to be heard together.

The Solicitor General and the attorneys for the defendants in error in Nos. 643, 644,645 and 646 have respectively signified their consent to this motion.

Dated April 24, 1911.

Respectfully submitted,

MAXWELL EVARTS,

Of Counsel for plaintiff in error.

853 and 854

(Filed ..... 1909.)

SUPREME COURT OF THE UNITED STATES.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, AND CROWELL LUMBER COMPANY.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE UPDIKE GRAIN COMPANY AND CROWELL LUMBER & GRAIN COMPANY.

MOTION TO DISMISS.

CORNELIUS J. SMITH,
EDWARD P. SMITH,
Attorneys for
Crowell Lumber & Grain Company.

WILLIAM H. LOGUEN,
HOYT ELY,
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Attorneys for
Union Pacific Railroad Company.

(22264 and 22265.)

SUPREME COURT OF THE UNITED STATES.

—o—

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, AND CROWELL LUMBER COMPANY.

—o—

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

THE UPDIKE GRAIN COMPANY AND CROWELL LUMBER & GRAIN COMPANY.

—o—

MOTION TO DISMISS.

—o—

Comes now the Crowell Lumber & Grain Company, one of the defendants in error herein and moves the Court todismiss these proceedings out of this court for the following reasons:

1. The judgments entered in the Circuit Court and in the Circuit Court of Appeals were separate judgements and not joint judgments.

2. The judgment entered in the Circuit Court of Appeals in favor of this defendant and against the plaintiff in error was in the sum of Three Hundred Fourteen and 11-100 Dollars and interest and costs.

3. The amount in controversy between the plaintiff in error and this defendant in error is not sufficient to give this court jurisdiction.

CROWELL LUMBER & GRAIN COMPANY,
By CONSTANTINE J. SMYTH
EDWARD P. SMITH
Its Attorneys.

353 and 354

(22264 and 22265.)

SUPREME COURT OF THE UNITED STATES.

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UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, AND CROWELL LUMBER COMPANY.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

THE UPDIKE GRAIN COMPANY AND CROWELL LUMBER & GRAIN COMPANY.

BRIEF ON MOTION TO DISMISS.

CONSTANTINE J. SMYTH,
EDWARD P. SMITH,
Attorneys for Crowell Lumber & Grain Company.

NELSON H. LOOMIS,
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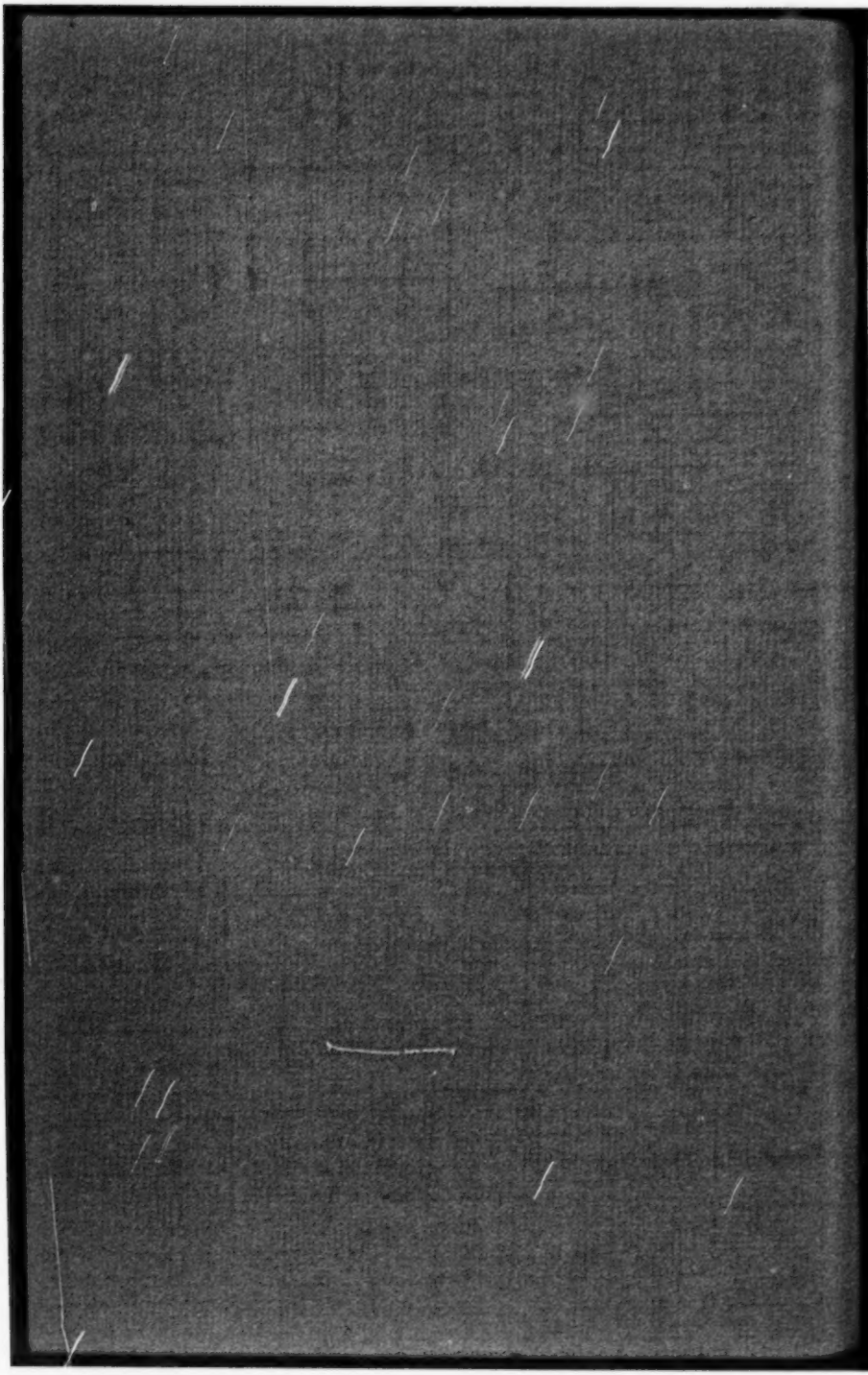
F. C. DILLARD,
R. W. BLAIR,
E. H. CROCKER,
Attorneys for Union Pacific Railroad Company.

BYRD PRINTING COMPANY



(22264 and 22265.)

SUPREME COURT OF THE UNITED STATES.

—o—

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

THE UPDIKE GRAIN COMPANY, NEBRASKA-IOWA GRAIN COMPANY, AND CROWELL LUMBER COMPANY.

—o—

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

VS.

THE UPDIKE GRAIN COMPANY AND CROWELL LUMBER & GRAIN COMPANY.

—o—

BRIEF ON MOTION TO DISMISS.

—o—

The several defendants in error herein filed separate complaints before the Interstate Commerce Commission charging the Union Pacific Railroad Company with unjust and illegal discriminations practiced against them and as a part of the relief demanded reparation. The cases were consolidated by order of the Interstate Commerce Commission but a separate finding was made in favor of each complainant. (Transcript of Record, Page 30.) A separate order of reparation was made in favor of each complainant. (Record Page 31.) Suit was subsequently brought to

enforce the payment of the amounts awarded the several complainants and on the trial before a jury in the Circuit Court of the United States for the District of Nebraska, Omaha Division, a separate verdict was returned in favor of each defendant in error, and a separate judgment entered. (Record Page 23.)

The United States Circuit Court of Appeals required each defendant in error to remit certain specified amounts and when the proper remittitur was filed, entered a separate judgment in favor of this defendant in error. (Record Pages 283-284.)

The amount of judgment in favor of this defendant in error is not sufficient to give this Court jurisdiction upon a writ of error and the aggregate amount of the several judgments can not be taken to confer jurisdiction upon this Court to review the judgment rendered in its favor.

Seaver vs. Bigelow, 72 U. S. 208.

Schwed vs. Smith, 106 U. S. 188

Paving Company vs. Mulford, 100 U. S. 148.

Chatfield vs. Boyle, 105 U. S. 233.

Russell vs. Stansell, 105 U. S. 304.

Farmer's Loan etc. Company vs. Waterman, 106 U. S. 271.

Hawley vs. Fairbanks, 108 U. S. 549.

Fourth National Bank vs. Stout, 113 U. S. 686.

Stewart vs. Dunham, 115 U. S. 64.

Henderson vs. Wadsworth, 115 U. S. 276.

Gibson vs. Shufeldt, 122 U. S. 34.

Walter vs. Northeastern R. Co., 147 U. S. 373.

Hunt vs. Bender, 154 U. S. 556.

From the foregoing cases it is apparent that the rule is firmly established that where there are several and distinct judgments this Court will review on error proceedings only those judgments that in and of themselves equal the jurisdictional amount. It follows that the proceedings to review in this court the judgment of the Circuit Court of Appeals so far as that the judgment determined the rights of the Crowell Lumber & Grain Company should be dismissed.

Respectfully submitted,

CONSTANTINE J. SMYTH,
EDWARD P. SMITH,
Attorneys for
Crowell Lumber & Grain Company
Defendant in Error.

FILED.
OCT 9 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 353, 354, 355, 356.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE UPDIKE GRAIN COMPANY AND OTHERS,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

MAXWELL EVARTS,
F. C. DILLARD,
HENRY W. CLARK,
Counsel for Plaintiff in Error.

C. G. BURGOYNE, 72 to 76 Spring Street, New York.

Supreme Court of the United States.

OCTOBER TERM, 1911.

Nos. 353, 354, 355, 356.

UNION PACIFIC RAILROAD COMPANY,
Plaintiff in Error,

AGAINST

THE UPDIKE GRAIN COMPANY, and others,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This is a suit brought, pursuant to the second paragraph of Section 16 of the Act to Regulate Commerce, to enforce an order of the Interstate Commerce Commission awarding damages for an

alleged discrimination against the defendants in error, consisting in the refusal to pay to them certain elevator allowances provided for in the freight tariffs.

Explanation of the Various Writs of Error Involved.†

On January 6, 1909, the Commission awarded reparation, by a single order, in favor of the Updike Company, Nebraska-Iowa Grain Company and Crowell Lumber and Grain Company, defendants in error, and also in favor of two companies not parties to this suit (15 I. C. R. 90; Record, p. 13). As permitted by the third paragraph of Section 16 of the Act to Regulate Commerce, the three defendants in error filed, in the United States Circuit Court for the District of Nebraska, a joint petition to enforce the reparation awards in their favor.

The jury having found in favor of the petitioners by direction of the Circuit Court (direction of verdict, p. 193, verdict, p. 22), judgment

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† References hereinafter to pages are to the Record printed in Nos. 353, 354, 355, unless expressly stated to be references to the Record in No. 356. The Union Pacific Railroad Company and The Updike Grain Company will be hereinafter referred to, respectively, as Union Pacific and Updike Company.

was rendered in favor of the petitioners separately for the amounts awarded by the Commission, viz: Updike Company $6,742.10, Nebraska-Iowa Grain Company $2,509.74, Crowell Lumber and Grain Company $698.29; and interest in each case. The Union Pacific thereupon sued out a writ of error from the Circuit Court of Appeals to review the judgment as to all three petitioners (p. 265), the case on this writ of error being designated in the Circuit Court of Appeals as No. 3135. Separate writs of error were also sued out as to each of the petitioners, the cases on said writs being designated below as Nos. 3136, 3137 and 3138. It was stipulated (p. 269) that one copy of the record and bill of exceptions was sufficient for the prosecution of all the writs of error and that only one record and bill of exceptions should be transmitted to the Clerk of the Circuit Court of Appeals, to be considered as the record in each of the separate cases. The Circuit Court of Appeals deemed the judgment single and reviewable as to all parties upon one writ of error and dismissed the writs sued out against the petitioners separately (p. 275). After considering the case designated as No. 3135, the Circuit Court of Appeals rendered judgment *nisi*, reversing the judgment as

to each petitioner unless each should within sixty days remit a specified amount of the judgment of the Circuit Court (p. 280). Such remittitur was filed by the Updike Company (p. 281) and the Crowell Lumber and Grain Company (p. 282). Final judgment was thereupon rendered (p. 283) affirming the judgment as to the Updike Company and as to Crowell Lumber and Grain Company, as reduced by the remittiturs to $6,310.18, and $314.11, respectively, and interest in each case, and reversing the judgment as to the Nebraska-Iowa Grain Company on default of a remittitur by it.

The Union Pacific then sued out from this Court a writ of error as to the judgment of the Circuit Court of Appeals as a whole (pp. 284, 299), being case No. 353 in this Court. A separate writ of error was sued out as to the Updike Company and Crowell Lumber and Grain Company (pp. 302, 317), being case No. 354 in this Court. A third separate writ of error was sued out as to the Updike Company alone (pp. 319, 332), being case No. 355 in this Court. All the foregoing writs were directed to the judgment rendered in the case designated by the Circuit Court of Appeals as No. 3135. A fourth separate writ of

error was sued out from this Court as against the Updike Company alone upon the judgment of the Circuit Court of Appeals dismissing the separate writ of error to the Circuit Court to review the judgment in favor of that company, being the case designated in the Circuit Court of Appeals as No. 3136 and in this Court as No. 356 (Record in No. 356: petition for writ of error, p. 30; writ of error, p. 32; judgment of dismissal, p. 39; writ of error to Circuit Court of Appeals, p. 47). Counsel stipulated (p. 334) that the record in C. C. A. No. 3135 (No. 353 in this Court) may be considered as a part of the record in C. C. A. No. 3136 (No. 356 in this Court).

History of Litigation as to Elevator Allowances.

The basis of the suit is an alleged discrimination by the Union Pacific in favor of competitors of petitioners at Omaha and Council Bluffs in the payment of certain elevator allowances named in the tariffs. These elevator allowances have been the subject of a protracted litigation and the question involved in the present suit needs for introduction a brief statement of the history of the entire litigation regarding elevator allowances under the Act to Regulate Commerce.

In 1904, after an investigation, the Interstate Commerce Commission rendered a decision *In the Matter of Allowances to Elevators by the Union Pacific Railroad Company* (10 I. C. R., p. 309 ; Record, p. 210). The Commission found that the Union Pacific was an extensive carrier of grain produced in Nebraska and Kansas for which the markets of consumption were in the eastern states and foreign countries, that it was " highly important, if not absolutely essential, for the Union Pacific to provide for the transfer of this grain to other cars than its own at its termini on the Missouri River " in order to secure the prompt release of its equipment. To effect this result the Union Pacific entered into an agreement with Frank H. Peavey in 1899 (afterwards assigned to Omaha Elevator Company), by which the Union Pacific conveyed a tract of land in Council Bluffs for the construction of an elevator, and agreed to pay on all grain transferred through said elevator a transfer charge not exceeding one and one-quarter cents per hundred pounds, and by which Peavey agreed to erect and maintain an elevator, to receive from the railroad company any grain originating on its lines consigned to or in care of said elevator, and to promptly transfer said grain from the

company's cars through said elevator, and further to receive and store for forty-eight hours free of charge any grain originating on the Union Pacific lines and delivered from its tracks at said elevator for storage or transfer. A similar situation existed at Kansas City and a similar arrangement was made by the Union Pacific for the transfer of grain at that point, the elevator at Kansas City being operated by the Midland Elevator Company. The elevators of the Omaha Elevator Company and Midland Elevator Company are commonly designated as Peavey Elevators, because the stock of these companies is chiefly owned by F. H. Peavey & Company. F. H. Peavey & Company were grain merchants and extensive buyers of grain upon the Union Pacific lines. It was expressly found by the Commission after full consideration that the arrangement was proper and necessary to protect the interests of the Union Pacific, that it was not debarred from dealing with Peavey & Company because they happened to be grain merchants as well as elevator proprietors; that the contracts were made in good faith, that the allowance of one and one-quarter cents was reasonable in amount, and that any injury resulting to rival carriers,

who were the real complainants in the case, was something which the law does not seek to prevent.

On April 9, 1907, the Commission rendered a second decision (12 I. C. R., p. 85; Rec., p. 225) in the same proceeding after an additional investigation made upon petition by certain other railroad companies interested in the grain traffic. In the meantime the Act to Regulate Commerce had been amended by the Act of June 29, 1906, to include in the term "transportation" all services in connection with the elevation, and transfer in transit, storage, and handling of property transported (Sec. 1 as amended), requiring the carrier to include in its tariffs all terminal and storage charges, etc. (Sec. 6 as amended), and amending Section 15 by the addition of the following provision :

> "If the owner of property transported under this act directly, or indirectly, renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers."

The elevator allowance of one and a quarter cents per hundred pounds theretofore made only to the Peavey elevators, and to the Trans-Mississippi Grain Company, a company leasing and operating an elevator at Council Bluffs owned jointly by the Union Pacific and five other railroad companies, had been extended by published tariff to all other elevators at Omaha, Council Bluffs and Kansas City. The Commission concluded that the law clearly recognized the right of carriers to furnish elevation for the benefit of shippers, that the railroad company might either construct and operate its own elevator or furnish elevation facilities by some arrangement with the owner of an elevator, and that the only restriction imposed by the Act was that the same privilege must be open to all on equal and reasonable terms. It was held that the allowance made by the Union Pacific, embracing as it then did all the available elevators at Omaha, Council Bluffs and Kansas City, was in itself lawful. But the Commission thought that the just and reasonable allowance which a carrier might make to a shipper for elevation or other services rendered in connection with the transportation of his own property must be considered in connection with the other provisions

of the law forbidding undue preference and rebates, and held that in so far as such allowance involved a profit over and above the actual cost of the services rendered it became a rebate and unlawful discrimination. It was found that an allowance of three-quarters of one cent per hundred pounds would cover the actual cost of the elevation without returning a profit. Thereupon, the Commission by an order effective June 1, 1907, directed the Union Pacific to abstain from paying to any persons any allowance or compensation for services rendered in the transfer, release of car equipment or elevation of grain at Council Bluffs or Kansas City or adjacent places greater than three-quarters of one cent per hundred pounds.

On June 29, 1908, the Commission rendered another decision upon a reargument of the same proceeding (14 I. C. R., 315; Rec., p. 237), concluding upon "further reflection" that the reduction of the elevator allowance to three-quarters of one cent had not reached far enough. It was reasoned that Peavey & Company enjoyed advantages, not accruing to all other shippers of grain, in the commercial advantages incident to elevation. By elevating their grain at Council Bluffs and Kansas City, Peavey &

Company were enabled to obtain storage beyond the usual elevation period of ten days, and to weigh, inspect, mix and treat the grain if desired. It was concluded, therefore, that the payment of any amount, however small, to Peavey & Company for the elevation of grain belonging to them resulted in undue preference and an unlawful rebate unless confined to grain that was reshipped within the elevation period of ten days and not mixed, treated, weighed or inspected in the elevator. An order was accordingly made on June 29, 1908, directing the Union Pacific forthwith to cease and desist from paying any allowance to Peavey & Company on their own grain received into any of their elevators at Kansas City and Council Bluffs *that was not reshipped out of said elevators within ten days or upon any grain that had been mixed, treated, weighed or inspected in the elevators* (See order in record in Peavey Cases Nos. 286 and 287, p. 40).

On the same date as that of the last decision in the Peavey cases above mentioned, June 29, 1908, the Commission decided cases brought by the Traffic Bureau of the Merchants' Exchange of St. Louis against the Chicago, Burlington and Quincy Railroad Company and

other railroad companies. In these cases complaint was made in behalf of grain dealers at St. Louis against the elevator allowances paid by the various railroad companies at the Missouri River as involving a discrimination against St. Louis. The various railroad companies, acting upon the Commission's prior decision in the Union Pacific-Peavey case, had established elevator allowances at the Missouri River of three-quarters of one cent per hundred pounds. While the necessity for releasing equipment which had moved the Union Pacific to inaugurate the elevator allowances did not apply to the railroad companies whose lines extended from the grain fields across the Missouri River to points further east, it was claimed by the other railroad companies that competition with the Union Pacific had required them to put the same allowance in force. It appeared that a carload of grain might be handled either through Omaha or St. Louis to an eastern destination at the same tariff rate, but that the grain dealer at Omaha, by transferring and elevating his grain at that point, would receive under the tariffs an allowance of three-quarters of one cent per hundred pounds, while the dealer who elevated his grain at St. Louis received nothing by way of

elevation allowance. It was therefore deemed evident that the dealer upon the Missouri River had the advantage of the dealer at St. Louis by exactly the amount of the elevation allowance and that a discrimination existed against the market of St. Louis. Accordingly an order was made directing the different railroad companies to cease and desist on and after October 1, 1908, from giving or paying *any* allowance for services rendered in the elevation of grain at Kansas City and other Missouri River points, this order not being limited like that in the Peavey case to allowances on grain stored more than ten days or grain treated in the elevator (See order in record in Peavey Cases, Nos. 286 and 287, p. 105).

On October 16, 1908, upon intervention and rehearing petitions in the St. Louis case the Commission said that while its previous order had run only against points upon the Missouri River it was self-evident that to stop the granting of these allowances upon the Missouri River while they continued elsewhere would be to create a serious discrimination *against* that locality, and held: "The principle of our decision applies everywhere. We expect that the decision will be universally accepted by car-

riers. * * * If payment of the elevator allowance, and what amounts to the same thing, the granting of free elevation, cannot be prohibited everywhere then it ought not to be prohibited upon the Missouri River."

Suits were brought in the Circuit Court for the Western District of Missouri by Peavey & Company and other parties adversely affected by the orders made by the Commission on June 29, 1908, in the Peavey and St. Louis cases, to set aside and annul the said orders, and the Circuit Court (three Circuit Judges sitting) decided that the orders were illegal and that the elevator allowances at Missouri River points were valid and lawful (176 Fed., 409). The appeals from these decisions of the Circuit Court are before this Court as Nos. 285, 286 and 287.

Facts in Present Suit.

As the judgment in favor of the Nebraska-Iowa Grain Company has been reversed and the award in its favor is therefore not before this Court, and as the judgment in favor of the Crowell Lumber and Grain Company is less than the amount necessary to give this Court jurisdiction, we will for the sake of brevity omit any statement of the pleadings or evidence re-

lating solely to the claims of those two companies.

The material facts pleaded or proved are as follows: The Updike Company was engaged in the business of buying, selling and shipping grain in carload lots and in operating a transfer elevator located upon the tracks of the Union Stock Yards in South Omaha, Nebraska. The Union Pacific is engaged in the interstate transportation of property. (Petition, p. 1; admitted by answer, p. 16). On June 27, 1906, the Union Pacific issued and published its tariff known as G. F. O.* No. 888, effective on that date, and filed the same with the Interstate Commerce Commission as I. C. C. No. 2029, which continued effective until superseded by tariff G. F. O. No. 904, effective June 1, 1907. Tariff No. 888 annexed to the petition provides in substance that to expedite the movement and to secure the prompt release and return of equipment an allowance of one and one-quarter cents per hundred pounds will be made by the Union Pacific to the elevators performing the service on grain in carloads transferred by the elevators at South Omaha, Omaha, Council

* General Freight Office.

Bluffs and Kansas City upon the conditions: *First*, that the grain must originate at points on the Union Pacific Railroad, at or west of Gilmore, Nebraska, and Muncie, Kansas, and be transported by it to South Omaha, Omaha, Council Bluffs, or Kansas City; *Second*, that the allowance will apply only to grain which moves to points beyond Council Bluffs or Kansas City; *Third*, that no allowance will be made when more than forty-eight hours elapse between time of delivery of loaded cars by the Union Pacific to the elevator, or to a connecting line for the elevator, and the release and return of the empty to the Union Pacific. Tariff No. 904, which superseded No. 888 and which is not involved in this case, reduced the allowance to three-fourths of one cent per one hundred pounds. (Petition, pp. 2, 9–11; admitted by answer, p. 16). Rules of the American Railway Association were in force during the times mentioned in the petition to the effect that loaded cars received in switching service must be confined to switching territory and when made empty must be returned to the owner if the owner has a direct connection within the switching territory, or, otherwise (*a*) be returned to the road from which the car was received, or (*b*) be loaded and forwarded via any

route in the direction of the home road or so that the home road may participate in the freight rate. (Petition, p. 2, admitted by answer, p. 17). Elevators owned and operated by the Omaha Elevator Company, the Trans-Mississippi Grain Company and J. F. Twamley & Son were located upon the tracks of the Union Pacific (petition, p. 2; admitted by answer, p. 17). With the approval of the Union Pacific, and by agreement with the several railroads whose lines enter Omaha and South Omaha, the Union Stock Yards Company made a rule for the handling of cars when made empty, which is attached to the petition as exhibit "C." This rule conforms in substance to the aforesaid rules of the American Railway Association, except that it permitted cars of roads foreign to the switching territory to be returned *either loaded or empty* to the road from which they were received. (Petition, pp. 2, 12; partially denied by answer, p. 17, but substantially proved, p. 86). The petition in paragraph 7 alleges that from June 27, 1906, until January 1, 1908, the Union Pacific allowed and paid to the elevators located upon its tracks at Omaha, South Omaha and Council Bluffs, the elevation allowance provided in its tariffs Nos. 888 and

904, whether the grain was loaded in foreign cars or in Union Pacific cars, but that the Union Pacific has refused to pay said elevator allowance to the complainants, and charges that the provisions in the tariffs requiring as a condition precedent to the payment of such elevation allowance, that the cars must be returned to the Union Pacific within forty-eight hours is unreasonable and illegal, and was inserted for the purpose of giving preference to the elevators located upon the tracks of the Union Pacific as against elevators belonging to the complainants to reach which a switching service is necessary (pp. 3 and 4; see also p. 7, paragraph 11). The answer (p. 18, paragraphs 7 and 11, and the amendment of paragraph 7, p. 179), admits that the defendant paid to the Omaha Elevator Company and the Trans-Mississippi Grain Company the elevation allowance provided in its said tariffs, where all the requirements and conditions of the tariffs had been complied with, and denies all other allegations of paragraphs 7 and 11 of the petition. It was proved that no elevation allowances had been paid to the Updike Company (p. 109), and that the allowances paid to Omaha Elevator Company included foreign cars (p. 37). The petition then alleges in paragraph 8 (p. 4), that

between June 26, 1906, and June 1, 1907, the Updike Company purchased and loaded at stations on the Union Pacific west of Gilmore, Nebraska, in cars furnished by Union Pacific large numbers of cars of grain. The answer admits as to this allegation only that it had limited grain transactions with the Updike Company and that it furnished such cars as that Company used for transportation from points on its line (p. 18). The same paragraph of the petition alleges that such grain moved to points beyond Council Bluffs, that the cars were delivered at Omaha by Union Pacific at a transfer track to be moved by the Union Stock Yards Company to the Updike Elevator, that the grain from said cars was transferred at the Updike Elevator, that the cars were *unloaded* within 48 hours from delivery by Union Pacific at the transfer track, and when unloaded were returned by Stock Yards Company to their owners pursuant to circular Exhibit "C," or were reloaded by Updike Company and forwarded as permitted by said circular. It is alleged in the same paragraph that during the same time the Updike Company transferred at its elevator 103 cars of grain which were returned to the Union Pacific within forty-eight hours, 313 cars belonging to roads having

direct connection within the switching territory, which cars when made empty were returned to the owners, 355 cars belonging to various roads having no direct connection within the switching territory which cars when made empty were loaded in the direction of the home road or so that the home road would participate in the freight rate, and 54 cars which were thereafter returned to the Union Pacific (but not stated to have been returned within the forty-eight hour limit). The weight of grain contained in the cars of the respective classes mentioned is given, and it is alleged that by the failure of the Union Pacific to pay the elevator allowance therefor, while paying it to competitors, the Updike Company was damaged in the sum of $6,742.10. The answer denies all of the foregoing allegations (p. 18). The Commission's findings were introduced as evidence to support these allegations and they prove the allegations as to the number of cars of each class above mentioned and the weight of grain therein, and that the grain was unloaded by Updike Company, but contain no facts as to the origin of the grain or other details necessary to bring it within the tariff conditions (p. 31). The petition finally alleges the filing of complaints

with the Interstate Commerce Commission charging the Union Pacific with discrimination on account of the matters set forth in the petition, the hearing before the Commission and the order of the Commission which is annexed as Exhibit "D," awarding reparation to the complainants respectively (pp. 8, 13, admitted p. 19).

The answer alleges affirmatively (p. 19) that the handling of the grain through complainants' elevators was not in the exercise of public duty, but for the purpose of private gain, and was for the purpose of having said grain weighed, stored, inspected, cleaned, mixed or otherwise treated in said elevators, and that tariffs G. F. O. Nos. 888 and 904 extended to the complainants unlawful, unjust and discriminatory advantages over their competitors in the same district and territory.

The testimony includes the following additional matters of more or less pertinency. The greater part of the grain received by the Updike Company from the Union Pacific came in foreign cars (p. 93). The grain is weighed in the elevator by the weigh-master of the Omaha Grain Exchange and sometimes inspected there (p. 94). The Updike Company sometimes cleaned and mixed the grain in the elevator

(pp. 106–7). Switching to the elevator is done by the Stock Yards engine from the Union Pacific transfer track about three-fourths of a mile from the elevator (p. 95). After a car was made empty it was pulled outside the house and removed by the Stock Yards engine (p. 96). A switching list was given to the Stock Yards Company each evening ordering the empties distributed. The switching engine usually filled the unloading track at night and the Updike Company unloaded all the cars during the next day. (p. 97). The cars were unloaded by shovel run by electric power, and each car required from twenty to thirty minutes for unloading (p. 102). The daily average of cars received and unloaded was about twenty. They were usually unloaded by ten o'clock in the morning. (pp. 103–104). Only about ten per cent. of the Updike grain was brought over the Union Pacific. One of the officers of the Updike Company testified to a conversation with Mr. Lane, the First Assistant General Freight Agent of the Union Pacific, after the issuance of tariff No. 888, with reference to the tariff provision that the cars must be returned to the Union Pacific within forty-eight hours, and claimed that Mr. Lane stated that the

Updike Company should continue to load out foreign cars toward the home line as permitted by the Stock Yards circular and that this practice would not affect the collection of elevation by the Updike Company (pp. 109–110–111). The business of the Omaha Elevator Company was principally from stations on the Union Pacific lines, only about fifteen per cent. of its business coming over foreign lines (p. 150). The elevation allowance paid to the Omaha Elevator Company by the Union Pacific included grain that arrived in foreign cars as well as Union Pacific cars (152-153). Weight of the carload for the purpose of determining the freight to be paid was determined by the official weight certificate of the Grain Exchange, which was made at the elevator, and settlement with the party from whom the grain was purchased was made on the weights and grades of the Grain Exchange (p. 154). The business transacted at the Updike elevator included only grain owned by the Updike Company and all the items of its claim for elevation allowance were upon its own grain. The contract between the Union Pacific and Frank H. Peavey as to the construction of the elevator at Omaha, afterwards assigned to the

Omaha Elevator Company, was admitted in evidence, and also a supplemental contract of July 9, 1906, defining the provision in the original contract for prompt transfer of grain and return of the cars as requiring release of equipment within 48 hours (pp. 184, 194, 202). The contract between the Union Pacific and the Trans-Mississippi Grain Company was admitted in evidence (pp. 184–202) which provides for allowance at the rates currently paid to the Omaha Elevator Company (p. 204). Both the Omaha Elevator Company contract and the Trans-Mississippi contract require the elevator to accept all grain tendered by the Union Pacific whether or not consigned to it and to give free storage for the same for forty-eight hours.

The defendant moved the court to direct a verdict in its favor on the grounds,—that the petition did not state a cause of action, and that the proof did not support the petition, and the defendant separately moved for a verdict upon that part of the claims based upon cars which were not released within forty-eight hours. Said motions were denied and exceptions taken (p. 189). The court then directed a verdict in favor of each of the complainants for the full amount of their claims (p. 193).

The Circuit Court of Appeals found no error in the judgment below except to the extent that it was based upon an allowance upon cars returned to the Union Pacific but not returned within the 48 hour limit. This was held to be a reasonable provision in the tariffs. Therefore, the judgment in favor of the Updike Company was reduced, upon its remittitur of the amount recovered on such cars, and, as so reduced, was affirmed (pp. 278–280, 178 Fed., 223).

Assignment of Errors.

1. The Circuit Court of Appeals erred in not sustaining the exception to the refusal of the Circuit Court to direct a verdict in favor of the defendant against complainant, Updike Grain Company.

9th Assignment, p. 323.
Exception taken at p. 189.

2. The Circuit Court of Appeals erred in not sustaining in its entirety the exception to the Circuit Court's direction of a verdict in favor of the Updike Grain Company.

11th Assignment, p. 323.
Exception taken at p. 194.

ARGUMENT.

I. Jurisdiction.

The jurisdiction of this Court is invoked under the last paragraph of Section 6 of the Act of March 3, 1891, c. 517, which provides:

> "In all cases not hereinbefore, in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."

The jurisdiction of the Circuit Court over this case was conferred by the second paragraph of Section 16 of the Act to Regulate Commerce as amended June 29, 1906, so that the case is not within any of the classes of cases specified in Section 6 of the Act of 1891 in which the decision of that court is made final.

Since Section 16 of the Commerce Act made no provision as to the procedure to review a judgment on a petition in which the separate claims of several petitioners had been joined, four separate writs of error were sued out as a precautionary measure. The Circuit Court of

Appeals has dismissed three of the writs as unnecessary, and, on the remaining writ, has reversed the judgment as to one petitioner and affirmed as to the two other petitioners. To review the action of the Circuit Court of Appeals four writs of error have been sued out in the exercise of abundant caution.

It is evident that some of the writs of error are irregular and that not all of the matters sought to be presented by them can be reviewed by this Court. The writ in No. 353 directed to the whole judgment of the Circuit Court of Appeals, affecting all petitioners, is irregular in that it does not exclude that part of the judgment which reversed the judgment of the Circuit Court as to the Nebraska-Iowa Grain Company, the judgment as to that Company not being, therefore, a final judgment (*United States vs. Krall*, 174 U. S., 385). Both the writ in No. 353 and the writ in No. 354 are apparently irregular in that they do not exclude the part of the judgment in favor of the Crowell Lumber and Grain Company which amounts to less than the statutory limit of one thousand dollars, and should probably be deemed a separate and distinct claim not deriving any benefit for jurisdictional purposes from the amount of the judg-

ment in favor of the Updike Grain Company (*Gibson vs. Shufeldt*, 122 U. S., 27).

The only matter reviewable by this Court, we believe, is the affirmance of the judgment, as reduced, in favor of the Updike Grain Company. There can be no doubt that this part of the judgment is properly presented for review, either by the separate writ (No. 355) sued out to review the part of the judgment in favor of that Company alone in the case designated in the Circuit Court of Appeals as No. 3135, or by the separate writ (No. 356) sued out to review the dismissal by the Circuit Court of Appeals of the writ in No. 3136 as unnecessary. It appears to us not open to reasonable doubt that the Circuit Court of Appeals was correct in concluding that the judgment below constituted a single judgment, although awarding separate recoveries to the three petitioners, and that the judgment and every part of it may be challenged by a single writ of error. That being so, the plaintiff in error is entitled to bring to this Court for review any one or more of the severable and distinct parts of the judgment as to which, considered by itself, this Court has jurisdiction.

II. If all elevator allowances are inherently illegal, as held by the Interstate Commerce Commission, the judgment in favor of the Updike Company is erroneous, whether or not the Updike Company has complied with the conditions of the tariff, in that it requires the railroad company to make an unlawful payment.

This case depends in the first instance upon the decision of the Peavey cases, Nos. 286 and 287, with which this case will be argued. The Updike Company claims for the period from June 26, 1906, to June 1, 1907, the benefit of an elevator allowance offered in the Union Pacific tariff G. F. O. No. 888, which was effective between those dates, although it does not pretend to have complied with the conditions of that tariff, and charges a discrimination in the payment of such allowance by the Union Pacific to the Omaha Elevator Company (Peavey elevator) and Trans-Mississippi Grain Company which had complied with the tariff conditions. This tariff and its successor G. F. O. No. 904, were held lawful by decisions of the Interstate Commerce Commission in 10 I. C. R. 309, June 25, 1904, and 12 I. C. R. 85, April 9, 1907. The allowances to the Peavey elevator were made

originally under a contract of 1899, which was sustained by the Commission in its first decision above cited, and the tariff provision extended the same allowances to all elevators similarly situated. It was subsequently held, however, by the Commission in 14 I. C. R. 315, June 29, 1908, that the Peavey contract and the tariff were illegal as inevitably resulting in a preference and a rebate, in so far as the grain on which such allowance was paid was weighed, inspected, mixed or treated in the elevator. And the Commission held on the same date in the St. Louis case that *all* elevator allowances at Missouri River points were illegal (14 I. C. R., 317) and a short time subsequently that all elevator allowances *everywhere* were illegal (14 I. C. R., 510). However carefully the Commission may have chosen the language of its later opinions to abstain from too baldly discrediting its earlier decisions, the inevitable effect of its 1908 decisions was to hold that the prior decisions were unsound and that the elevator allowances, whether made under contract or tariff, were and always had been illegal.

We have contended, therefore, from the beginning of the Updike reparation claim that no award could be made to the Updike Company

based upon a tariff provision which was illegal and that no recovery could be predicated upon the payment of said illegal tariff allowances to other elevators. The Commission awarded reparation to the Updike Company (15 I. C. R. 90) upon the reasoning that during the period covered by the claim the tariff involved was maintained with the express sanction of the Commission and that it could not "without stultifying itself, make any ruling which would condemn as unlawful the payment of these elevator allowances during the time they have been expressly sanctioned by its decisions" (Peavey Record, p. 151). The Commission evidently entertains an erroneous conception of the nature and force of its decisions. It may be that "rates, regulations, and practices which it establishes within its jurisdiction become rules of action". But when it decides that the whole practice of elevator allowances is inherently and necessarily illegal, it is construing the governing law which prohibits rebates and discriminatory practices and it should have the courage to admit the logical conclusion that its prior erroneous constructions of the law gave no sanction or validity to the unlawful practice.

The Commission disclaims holding that "the

payment of these elevation allowances was unlawful *per se*" (15 I. C. R., 94). But a consideration of the opinions in 14 I. C. R., pp. 315, 317, 510, leaves no room for doubt that this is the effect of the decisions. The Commission says (p. 316): "If, therefore, the Union Pacific Railroad Company pays to Peavey & Company an allowance * * * however small on grain which has been mixed, treated, stored, weighed or inspected in their elevators, it amounts *pro tanto* to a contribution by the Union Pacific Railroad Company to Peavey & Company of the cost of securing these commercial results and benefits. The allowance, therefore, not only results in an undue preference when paid on grain belonging to the owner of an elevator thus under contract, but, in effect, is also an unlawful rebate, unless confined to grain that is reshipped within the elevation period of ten days and has not been mixed, treated, weighed or inspected." Holding this opinion, the Commission had no right or power to make the award in suit to the Updike Company, requiring the Union Pacific to give a rebate to that company. The fact that the Commission at one time entertained the idea that such an allowance was not a rebate does not justify this award.

The Circuit Court of Appeals dismissed this argument because in the equity suits brought to set aside the 1908 orders of the Commission, the Eighth Circuit Court (three judges sitting and, therefore, virtually being the Circuit Court of Appeals) had already decided that the elevator allowances were legal and that the Commission's decision to the contrary was unsound (p. 276).

The equity suits to set aside the Commission's orders of 1908 are now before this Court (Nos. 285–287) on appeal from the Circuit Court of Appeals. If this Court reverses the Circuit Court of Appeals, finally settling it to be the law that the allowances are unlawful, it will establish not only that this was the law in 1908, but also that it was the law in 1906 and 1907. Since tariff publication of an allowance forbidden by statute can give such allowance no validity (*Chicago & A. Ry. vs. U. S.*, 156 Fed., 558), it will follow that all payments made to Peavey & Company under tariff 888 were illegal however honestly intended, and that a like unlawful allowance cannot be enforced by the Updike Company whether under the tariff provisions or otherwise.

The plaintiff in error made appropriate allegations by way of affirmative defense that the grain

of the Updike Company was inspected, weighed, mixed and treated in its elevator (p. 19). The allegations were proved (pp. 94, 106, 107).

III. The judgment is erroneous in any event, because the Updike Company had not complied with the conditions of the tariff on which its claim is based.

If this Court sustains the Circuit Court of Appeals in the Peavey cases, upholding the legality of the elevator allowances declared illegal by the Commission, the claim of the Updike Company is still subject to the objection that the claimant has not complied with the provisions of the tariff upon which the payment of the allowance is conditioned.

The gist of the petition is a discrimination in favor of competitors of the Updike Company in the payment to them during the period covered by the Updike claim of the elevation allowance provided for in tariff G. F. O. No. 888 and the refusal to pay such allowance to the Updike Company (petition, p. 7, paragraph 11). Tariff G. F. O. No. 904 was subsequent to all items of the Updike claim. Tariff 888 (p. 9) offers an allowance of one and one-fourth cents per 100 pounds

to all elevators at South Omaha, Omaha and Council Bluffs, for transferring grain in carloads, subject to certain conditions which are in substance as follows :

1. The grain must originate at points on Union Pacific Railroad west of and including Gilmore, Nebraska and Muncie, Kansas, and be transported wholly by Union Pacific to Omaha, South Omaha or Council Bluffs.

2. The grain must subsequently move to points beyond Council Bluffs.

3. More than 48 hours must not elapse between the delivery of the loaded car by the Union Pacific and the return of empty car to Union Pacific; computed, as to elevators located on the Union Pacific tracks, from the delivery of the loaded car to the elevator until the release of the car by the elevator, and, as to the elevators located on connecting lines, from the delivery of loaded car by Union Pacific to the recognized point of interchange with the connecting line until the return of the empty by the connecting line to such point of interchange.

The Updike Company does not claim that it has complied with all the conditions of the tariff. Its claim is based (petition, p. 5; Commission's finding, p. 31) upon :

(*a*) 103 cars (6,457,140 lbs.) returned to Union Pacific within 48 hours. Allowance claimed, $807.14.

(*b*) 313 cars (20,585,820 lbs.), which cars belonged to roads having a direct connection within that switching territory, and which, when made empty, were returned to their owners, and not returned to Union Pacific. Allowance claimed, $2,573.32.

(*c*) 355 cars (23,436,960 lbs.) belonging to foreign roads having no direct connection in that switching territory, and which were not returned to Union Pacific, but were reloaded and forwarded in the direction of the home road or so that the home road would participate in the freight rate. Allowance claimed, $2,929.62.

(*d*) 54 cars, both Union Pacific and foreign, (3,456,230 lbs.), which were returned to the Union Pacific, but not within the 48-hour limit. Allowance claimed, $432.02.

The Updike Company attempted in the petition to excuse the non-compliance with tariff conditions as to items in class (*d*), above described, by alleging that 48 hours was an unreasonably short time within which to return the cars when the elevator was served by a connecting line, and that the switching to its elevator

by the connecting line was not under its control (pp. 3, 7). It is attempted to excuse its non-compliance with the conditions of the tariff as to items in classes (*b*) and (*c*) above described, by setting forth the rules of the American Railway Association and the Union Stock Yards Company under which certain foreign cars could not, in any event, it is claimed, be returned to Union Pacific (pp. 2, 12). As to items in class (*a*) alone, does it pretend to have fully complied with the tariff?

As to empty cars returned to Union Pacific, but not within 48 hours.

The Circuit Court of Appeals held that the evidence showed that 48 hours was a reasonable time within which to return cars, and that the switching companies were the servants of the elevator company (p. 278). It accordingly eliminated from the recovery of the Updike Company the amount of the items in class (*d*), above described (p. 280). The Updike Company has acquiesced in that reduction (p. 281), and its propriety is not before this Court.

As to cars not returned to Union Pacific because belonging to roads foreign to the switching territory.

The rules of the American Railway Association (p. 2) provided that, if the foreign cars belonged to a road having no direct connection within the switching territory, they should be returned empty to the road from which received or be reloaded via any route in the direction of the home road or so that the home road would participate in the rate. Such cars comprise the items in Class (*c*) of the Updike claim. Instead of returning these Class (*c*) cars empty to the Union Pacific the Updike Company adopted the alternative of reloading them and forwarding them toward the home road. The Union Stock Yards circular (p. 12) as to handling cars is somewhat more liberal than the rules of the Association. It provides that all foreign cars (meaning those not specifically described in the circular which are cars of roads having a direct connection in the switching territory, p. 90) may be returned *either loaded or empty* to the road from which they were received, in fact, must be so returned except in the case of foreign cars received from the

Union Pacific, while the rule of the Association as to such foreign cars was that they could be returned to the road from which received only when returned empty. As the Updike elevator was served by the Union Stock Yards switching department the foreign cars received by it from Union Pacific, included in Class (*c*) of its claim, would have been returned, whether loaded or empty, to the Union Pacific unless the Updike Company had chosen to reload the cars and forward toward the home road.

The Circuit Court held that the tariff provision as to return of cars within 48 hours was inoperative as to all foreign cars because by the car service rules of the Railway Association it was impossible for the elevator to return these cars to the Union Pacific (p. 191).

The Circuit Court of Appeals held that the car service rules rendered a return impossible and that by making allowances to Peavey & Company on foreign cars an unjust discrimination against the Updike Company resulted (p. 277).

As to the foreign cars belonging to lines having no direct connection within switching territory, both the courts below were in error in

assuming that the return to the Union Pacific was impossible. The rules of the Association as to such cars gave an option to return empty to the road from which received or to reload and route toward home. The rules of this Association are of course binding only upon the members of the Association, not upon shippers or switching companies not parties to the agreement. It does not appear that the Union Stock Yards Company was a member of the Association; on the contrary it appears quite clearly that it was not, for the circular of the Stock Yards, as above indicated, allowed the return of such cars, either loaded or empty, to the road from which received and left the matter entirely to the option of shippers served by the Stock Yards. Consequently, it was entirely possible for the Updike Company to return such cars to the Union Pacific and thus comply strictly with the condition of the tariff.

One of the officers of the Updike Company testified to a conversation with Assistant General Freight Agent Lane of the Union Pacific (pp. 109–111), which indicated the understanding of both to be that the cars belonging to roads foreign to that switching territory *could* be returned to Union Pacific. Mr. Lane is claimed to have

given some assurance that it was not necessary for the Updike Company to return such cars, but that it could load them toward the home road and still obtain the benefit of the tariff allowance. This evidence was properly excepted to as involving a variation of the published tariffs (pp. 110, 111). This evidence, whether showing Mr. Lane's construction of the tariff, or intended to establish a waiver, cannot help the Updike Company. It is not optional with the railroad company to observe or vary its published tariffs. If Mr. Lane had intended to waive one of the conditions of this tariff elevator allowance, he could not lawfully have done so and the Updike Company could not lawfully have accepted the benefit of such a waiver. Upon this ground the Commission refused to give any consideration to this evidence (15 I. C. R., 98).

It may have been more convenient for the Updike Company to reload to eastern destinations these foreign cars, instead of returning them to Union Pacific, but it was not impossible to return those cars belonging to roads not having direct connections in the Omaha switching territory. There is evidence that it was a benefit to the Updike Company so to load and forward (p. 116). This class of cars makes

up the items of Class (*c*) of the Updike claim, amounting to $2,929,.62, and as to this amount the judgment of the Circuit Court of Appeals is clearly incorrect.

As to cars not returned to Union Pacific because belonging to other roads having a direct connection within the switching territory.

We concede that under the car service rules of the American Railway Association and of the Stock Yards Company the foreign cars belonging to roads connecting with the Omaha switching territory, the basis of Class (*b*) of the Updike claim, could not be returned to the Union Pacific. Under both the rules of the Association (p. 2) and the circular of the Stock Yards Company (p. 12) such cars were required to be surrendered, when made empty, to their owners within the switching territory. But we deny the conclusion that the Updike Company is entitled therefore to recover the allowance on this class of foreign cars. By the Hepburn Law the carrier was required to state separately in its duly published and filed tariffs all "storage charges, icing charges, and all other charges which the Commission may require, *all privileges or facilities granted or allowed.*" This provision, in connection with

the inclusion of elevation in the definition of "transportation" in Section 1, and in connection with the third paragraph of Section 15, as amended, as to the allowance to shippers for services and instrumentalities furnished, leaves no doubt that the elevation allowances must be embodied in the tariffs and that any departure from them would subject the carrier to the penalties of the Act. The condition of return of equipment within 48 hours was an essential part of the allowance provided in Tariff No. 888. The Updike Company, therefore, cannot be allowed to recover upon Class (*b*) of its claim, upon the theory that the allowance is sanctioned by a lawful published tariff, for such recovery would be in direct violation of the tariff's condition as to return of cars, and would constitute an allowance on a class of cars expressly excluded from the tariff. The Union Pacific had no option as to its treatment of this claim; it could not make an allowance to the Updike Company on any cars not returned within 48 hours since no tariff authorized an allowance on such cars and the payment of such a claim would have constituted a departure from the published tariffs in clear violation of the prohibitions of the statutes.

As to cars returned to Union Pacific within 48 hours.

The petition alleges the unloading and transfer by the Updike Elevator of 103 cars of grain containing 6,457,140 pounds, which cars were returned to Union Pacific within 48 hours (p. 5), these items constituting class (*a*) of the Updike Company's claim. It may be that this part of the claim is meritorious, but the record does not contain the necessary proof to support the claim.

The petition alleges (p. 3) that the Union Pacific has refused to pay the tariff elevation allowance to each of the complainants on shipments of grain, which are described as to originating point, etc., in the language of the tariff. This was denied (answer p. 18, paragraph 7 as amended p. 179). It was proved that no allowances had been paid to the Updike Company for grain transported over the Union Pacific (p. 109), but this proof did not measure up to the allegation for it did not show the origin or any other of the details necessary to comply with the tariff conditions.

The claim of the Updike Company is alleged in detail in paragraph 8 of the petition (p. 4) and the allegations on a liberal construction

satisfy the various conditions of the tariff as to the 103 cars now in question. All the allegations of paragraph 8 were however put in issue by the answer except that it admitted limited grain transactions with the Updike Company and that it furnished such cars as the petitioner used for shipments from points on its railroad (p. 18).

Issue was raised therefore concerning the 103 cars now in question as to the performance of every condition of the tariff.

Practically no proof of the performance of the service required to satisfy the tariff was attempted except by introducing the findings of the Commission (p. 31). Section 16 of the Act makes these findings *prima facie* evidence of the facts stated therein. The pertinent finding is:

> "That the complainant between July 1, 1906, and July 1, 1907, unloaded at its elevator 103 cars of grain, containing in the aggregate 6,457,140 pounds, where the cars were returned to the Union Pacific within forty-eight hours, and upon this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds or $807.14."

There is nothing in this finding to indicate the origin of the grain or that it was transported

from originating point to South Omaha wholly by Union Pacific or that it subsequently moved beyond Council Bluffs. The subsequent movement, however, was proved (p. 177). The only testimony relating to the claim of the Updike Company is that of Kearney (pp. 92–108, 160) and Kuhn (pp. 108–116, 174–176, 177). This testimony was chiefly directed to the question of the reasonableness of the 48 hour limitation. The record will be searched in vain for any attempt to prove compliance with the material conditions of the tariff above indicated.

There was, therefore, on the most liberal view, a material and complete failure of proof as to the 103 cars.

IV. The provision in the tariff requiring the return of cars within 48 hours as a condition of the payment of the elevator allowances was a valid and lawful condition and cannot be annulled in whole or in part as discriminatory.

The Updike Company bases its claim upon tariff 888, although it has not complied with one of the essential conditions of the tariff, finding it impossible in some cases and inconvenient in others to do so. The extraordinary

result has been reached that the condition of the tariff as to prompt return of cars, constituting the sole purpose for which the allowance was offered, has been annulled as to certain cars and the full allowance named in the tariff awarded, while as to other cars the tariff condition has been held valid and the allowance denied. This result has been reached on the theory that the condition of the tariff discriminated against those who were not so situated that they could comply with it.

This result leaves the Union Pacific in a very unfortunate and embarrassing situation. In 1899, in order to secure prompt unloading and release of its equipment at Omaha, it entered into the contract with F. H. Peavey for the construction and operation of the elevator now owned by the Omaha Elevator Company, agreeing to pay a specified allowance for the elevation of all grain at that elevator whether the grain was owned by Peavey or by others. The rate of compensation for such elevation was subsequently reduced by order of the Interstate Commerce Commission. The Circuit Court in the Peavey case has held that this contract and the tariff conforming

thereto are valid and has ordered the payment to Peavey & Company of arrears of the allowance. To earn this allowance the Peavey elevator has been obliged in the past and will be obliged in the future to unload and release the cars within 48 hours. In order that no charge of discrimination might lie, the Union Pacific by tariff 888 extended to all elevators in the Omaha territory, subject to the same conditions, the same allowances provided in the Peavey contract. But the Circuit Court of Appeals in the suit at bar has held that the condition in the Peavey contract and in the tariff as to the return of equipment operates as a discrimination against those elevators which cannot return certain equipment and that the allowance must be paid to them notwithstanding their failure to comply with the condition. Consequently, if the decisions in the present case and the Peavey case both stand, the Union Pacific must continue to observe the Peavey contract, but the operation under this contract will render it liable on the ground of discrimination to make payments to the Updike Company and to numerous other elevator companies although they are not able to perform the same service performed by the Peavey elevator

or comply with all the terms of the Peavey contract.

1. The elevation for which allowance is offered in the tariff is a transportation service which the Railroad Company can perform itself or hire another to perform and in the latter event it has the right to select its own agencies on its own terms.

By amendment of Section 1 of the Act to Regulate Commerce in 1906 the term "transportation" is defined to include among other things "all services in connection with the receipt, delivery, elevation, and transfer in transit * * * of property transported" and it is declared to be the duty of every carrier to provide and furnish such transportation upon reasonable request therefor. For the purpose of securing the release of its equipment the Union Pacific might have constructed and operated its own elevator at Omaha and transferred thereat all grain coming over its line either at a reasonable charge or free of charge. It preferred in the first instance to contract for the construction and operation of an elevator by F. H. Peavey and to pay to the elevator owner an allowance upon all grain elevated. A similar contract was subsequently made with the Trans-Mississippi Grain Company. Both contracts require the

elevator to accept all grain tendered by the Union Pacific and to give free storage for the same for 48 hours. These arrangements are equivalent, so far as the relation between the railroad and the public is concerned, to the operation of an elevator by the Union Pacific itself free of elevation charge to the grain dealers. The Union Pacific had the right to make these contracts and to impose such terms upon its agents as it saw fit. The Circuit Court of Appeals in the present case has accepted this view but with a qualification. The court says (178 Fed., 229): "Elevation of this nature is a part of transportation which railroad companies are required to furnish on request. 34 Stat. 584, Sec. 1. They have the legal right either to furnish it themselves or to hire others to provide it. Since they have the right to employ others to provide elevation, they also have the indispensable right to prescribe the terms upon which they will make this employment, provided always those terms are neither unreasonable nor unjustly discriminatory" (Record, p. 279). We believe that the qualification expressed in the proviso above quoted is not sound so far as the proposition applies simply to the employment of an agent to perform the elevation service. The stat-

ute has no concern with the relations between the railroad company and its elevator agent in respect of the terms of the employment unless the elevator agent is also a shipper. Considering the elevator agent as such, divorced from any interest as a dealer in grain handled, it is not a matter for federal inquiry whether the compensation paid the agent is reasonable or whether the terms imposed upon him are precisely identical with the terms imposed upon other elevator agents. The terms of such employment are not yet governed by statute any more than the terms of the employment of a section hand. Therefore no other elevator has a right to demand that it be made an agent of the railroad company to perform elevation services simply because it is as well situated to perform such service as the elevators which have been selected. And if the railroad company elects to extend the same agency privilege to a number of elevators in the same locality it is immaterial whether or not one, by reason of natural advantages or by reason of favoritism, obtains more favorable terms of employment than the others. In the present case the Union Pacific offered its elevation allowance, *i. e.*, offered employment as its elevator agent, to

all elevators in the Omaha territory upon certain conditions. It may be that the conditions necessarily excluded some elevators by reason of their location or other circumstances creating an inability on their part to perform the service stipulated. If so, they have no ground for complaint.

The foregoing argument is, as stated, based upon a consideration of the elevator agent divorced from any interest as dealer in grain. For the purposes of this case the elevator owner must be so considered. The elevator allowance is not paid or offered to the shippers or owners of the grain. It is by the terms of the tariff a payment to be made to the elevators performing the service. It happens that the operators of all the elevators involved in this case are also extensive dealers in grain. The only importance of this fact is that a relation exists to which the provision of the last paragraph but one of section 15 of the Act to Regulate Commerce, added by amendment of 1906, becomes applicable. That provision is in substance that if the owner of property transported renders any service directly or indirectly connected with such transportation or furnishes any instrumentality used therein the charge or allowance therefor shall be no more than

is just and reasonable. This provision recognizes the right of the railroad company to relieve itself of the performance of some incidents of the transportation service by hiring the owner of the commodity transported to perform the service. The only condition imposed is that no more than a just and reasonable allowance shall be made by the railroad company for the performance of such service by the shipper. The railroad company is not precluded from hiring the Peavey elevator as its elevator agent by reason of the fact that the elevator is owned by a dealer in grain, but it must not take advantage of the opportunity afforded by that relationship to make an excessive allowance for the elevation service, since that would result in a profit to the owner of the elevator applicable to his business as a grain dealer. It is not claimed in this case that the allowance of three-quarters of one cent per hundred pounds paid to the Peavey and other elevators which earned the allowance by compliance with the tariff is an unreasonable or unjust allowance, as compared with the value of the elevation service. Therefore the provision of the last paragraph of Section 15 is satisfied, and this case is to be considered as if the elevators receiving the allowance were not operated by grain dealers.

There is nothing in the next to the last paragraph of section 15 relating to discrimination. While it permits the railroad to employ a shipper to perform some incident of the transportation service it does not require the railroad company to extend this privilege (if it be considered a privilege) to all shippers who are capable of performing the particular service even if it has in one or more instances employed a shipper for that purpose. For example, the railroad company may for reasons of its own pay to a farmer loading grain in a box car a reasonable amount for providing what is commonly called a " grain door " instead of hiring a local carpenter to furnish the materials and labor necessary, but upon a similar shipment by another farmer at the same station the Company may lawfully employ a carpenter for the purpose. The first farmer will make a little more profit than the second, not as a shipper of the grain, but because he has done additional work as a carpenter.

The application of the foregoing is that the Updike Company, as a dealer in grain, has no foundation for a complaint on account of the payment of the elevation allowance to the Peavey elevator, even if the Union Pacific refuses to make an allowance to the Updike Company

upon the same terms, the amount of the allowance not being an excessive payment *for the elevator service* and so not giving Peavey & Company any preference as grain dealers; and, as the owner of an elevator, the Updike Company has no standing whatever to demand its employment as elevator agent of the Union Pacific upon the same terms with the Peavey elevator. It is equally true that the Updike Company, whether as dealer in grain or as elevator owner, has no right to dictate that an elevator allowance shall be made to it upon *more* favorable terms and conditions that those granted to the Peavey elevator.

2. *There is no undue or unreasonable preference or advantage in favor of the elevators located on Union Pacific tracks or unjust discrimination against other elevators in the operation of the tariff condition as to return of cars.*

The Circuit Court of Appeals held as to cars, both Union Pacific and foreign, returned to the Union Pacific but not within 48 hours that the Updike Company was not entitled to compensation because the railroad offered the allowance upon the condition that the cars be returned within 48 hours and "a compliance with this condition was indispensable to the acceptance of that offer." But as to cars of other roads foreign

to the switching territory or having direct connection within the switching territory, which the Updike Company never returned, it was held that the claimant was entitled to the compensation although it had not complied with the condition. The reason assigned for such difference was that it was impossible for the Updike Company under the car service rules to return such cars to the Union Pacific, that "the inevitable effect of the payment of the elevation charge on such cars to Peavey & Co. when the defendants in error could not secure it under the specifications of the tariff was to give shippers in this class of cars through the elevators of Peavey & Co. a clear advantage of the amount of the elevation charge over shippers in cars of the same class through the elevator of the defendants in error" (Record, p. 277), and that this difference in operation and payment constituted an unjust discrimination. 178 Fed., 227. We have shown in a previous point that it was not impossible under the car service rules for the Updike Company to return cars belonging to roads foreign to the switching territory, although the return of cars belonging to roads connecting in that switching territory was impossible. Assuming, however, that the impossibility extended to both

classes of foreign cars we submit that the conclusion of the Circuit Court of Appeals is erroneous. Its conclusion appears to result from the failure to distinguish between a payment to the elevator for elevation service and the payment of a bounty to a dealer in grain. The charge of discrimination is predicated upon the unsound premise that if the railroad company employs and pays as its elevator agent one who is also a grain dealer it must extend the same employment upon equal terms to all other grain dealers willing to perform the service as elevator agencies. But even if this premise were sound we believe that no finding of undue or unreasonable preference or unjust discrimination could properly be made in this case. The Updike elevator and the Peavey and Trans-Mississippi elevators are not operated under substantially similar circumstances and conditions in relation to the Union Pacific. True, the Updike elevator is not located a sufficient distance from the Union Pacific tracks to justify a substantial difference in the rates for transportation proper charged to it as compared with those to elevators located on the Union Pacific tracks, but this small difference in location is sufficient to prevent the Updike elevator from obtaining

the full benefit of the elevator allowance offered by the Union Pacific. That result is one over which the Union Pacific practically has no control, for it is not probable that it could dictate the amendment of the car service rules to all other members of the American Railway Association, even if any amendment which would remedy the present difficulty were practicable. Section 15 of the Act expressly recognizes the right to make just and reasonable compensation to a shipper for a service which he renders in connection with the transportation. Surely, the general prohibitions of Sections 2 and 3 do not nullify this right, and they would nullify it if a carrier might not make an allowance to some shippers for a service simply because some other shippers were not (through no fault of the carrier) so situated that they could perform the same service. Tariff 888, as it expressly states, is made "to expedite the movement, and to secure the prompt release and return of equipment." The opinion of the Circuit Court of Appeals states comprehensively the value and necessity to the Union Pacific of the prompt return of its equipment (p. 279). It is reasonable that its tariff for this purpose should include the release of foreign cars in which it

has transported grain. It may be charged by the company owning the cars a *per diem* while they are in its possession (p. 110). The Union Pacific is entitled to re-load foreign cars returned to it. Even if it is obliged to return foreign cars to their owners in Omaha, it may return them loaded, and it would to that extent relieve its own equipment for use on its own lines.

A substantial advantage results in the release of foreign equipment as well as of its own equipment, for which it is entitled to make compensation. The Updike Company, not being in a position to perform the service as to certain foreign cars, which constitutes the consideration for the elevator allowance, the circumstances and conditions of this particular part of the transportation operation rendered it are not only substantially but *wholly* different from those with reference to other elevators which can and do return the foreign cars.

Upon the argument by which the Court below reaches the conclusion that the condition is invalid as to certain classes of foreign cars the condition must necessarily be held illegal also in its application to elevators located upon the Union Pacific tracks in dealing with such foreign cars. For if the Updike elevator, not being located on

the Union Pacific tracks, and so not being able to return certain classes of foreign cars, is excused from the performance of the condition as to such cars a discrimination would immediately result as against the Peavey and other elevators located on the Union Pacific tracks if the condition is enforced against them. Further, by the same process of reasoning, the condition cannot be enforced as to Union Pacific cars unless it is enforced also as to foreign cars, for any elevator receiving Union Pacific cars will be at a disadvantage, if it is required to return them within 48 hours, as compared with the elevators which receive foreign cars which need not be returned at all. The decision of the Circuit Court of Appeals has created as great a discrimination against the Peavey elevator as that which was deemed to exist under the tariff against the Updike Company. The Circuit Court encountered this dilemma (p. 181). The Interstate Commerce Commission, in considering this and the associated reparation claims, gave full force to the logic of the argument and held the condition invalid as to all cars whether or not it was possible to return them within the time limit. The Commission said (15 I. C. R., p. 101): "But even if it be assumed that forty-eight hours is a

reasonable time within which to return Union Pacific equipment, still it must be held with respect to these cars, as in the case of foreign cars, that the condition is unlawful. This grain moves in all kinds of equipment and to apply this time provision to Union Pacific cars when it cannot be applied to others creates a necessary discrimination."

The attempt to apply the unjust discrimination theory for the purpose of equalizing the disadvantage suffered by the Updike elevator and other elevators not located upon the Union Pacific tracks therefore results not only in the payment to the Updike elevator and elevators similarly situated of the allowance notwithstanding their inability to furnish the consideration for which the allowance was intended, but also must result in avoiding the condition as applied to elevators located upon the Union Pacific tracks unless those elevators are to be subjected to a disadvantage as against less favorably located elevators. Apparently the only way in which the charge of discrimination against some elevator can be avoided is by the entire withdrawal of the elevation allowance tariff. Presumably the railroad company would be only too glad to cancel the tariff since other-

wise it will be obliged to make the allowance without securing, except by the grace of the elevators, a prompt release of equipment. But the contract with Peavey & Company has been held valid by the Circuit Court and the payment of the allowance in arrears adjudged and therefore the Union Pacific must continue effective the tariff providing for the elevation allowance called for by the Peavey contract. Further, the decision below will constitute a precedent and invitation for a multitude of reparation claims on the part of elevators believing themselves to be as much entitled to the elevation allowance as the Updike Company, but which have not filed claims heretofore because of their inability to comply with the conditions of the tariff.

The Union Pacific does not deserve to be placed in the predicament above outlined. It can be rescued from that predicament only by a dismissal of this claim and a decision that it is not the function of the discrimination clause of the Act to Regulate Commerce to equalize the profits of all shippers and nullify all advantages derived from location, or any other natural or accidental cause, by means of the adjustment of railroad tariffs.

Conclusion.

Whether or not, therefore, the elevator allowances paid to competitors of the Updike Company are held to be illegal, the judgment of the Circuit Court of Appeals in favor of the Updike Company should be reversed and the case remanded with direction to enter a judgment reversing as to the Updike Company the judgment of the Circuit Court and dismissing its petition.

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HENRY W. CLARK,
Counsel for Plaintiff in Error.

Nos. 353, 354 & 355.

IN THE SUPREME COURT OF THE UNITED STATES.

Supreme Court, U. S.
FILED.
OCT 5 1911
JAMES H. McKENNEY,
Clerk.

Union Pacific Railroad Company,
Plaintiff in Error,

vs.

Updike Grain Company,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Cornelius J. Smith,
Edward E. Smith,
Attorneys for Defendant in Error.

IN THE SUPREME COURT OF THE UNITED STATES

———o———

Union Pacific Railroad Company,
Plaintiff in Error,

vs.

Updike Grain Company,
Defendant in Error.

BRIEF ON BEHALF OF DEFENDANT IN ERROR.

———o———

STATEMENT OF THE CASE.

At the time of preparing this brief, we have not been favored with a brief from counsel for plaintiff in error, and therefore a statement of the case on behalf of the defendant in error may not be improper.

The defendant in error is a corporation organized under the laws of the state of Nebraska and engaged in the business of buying and selling and shipping grain in carload lots, and in operating a terminal elevator at Omaha, Nebraska.

In July, 1908, the defendant in error filed a complaint with the Interstate Commerce Commission charging the Union Pacific Railroad Company with unjust, unreasonable and illegal discriminations practiced against it and in favor of its competitors in the Omaha market. It was charged, in substance, that the Union Pacific Railroad Company had published and filed certain tariff schedules containing provisions relative to an elevation allowance

which the Union Pacific Railroad Company said it would pay for unloading grain at terminal elevators.

It was charged that the Union Pacific Railroad Company, together with other carriers having lines of road into Omaha, had entered into certain agreements governing the movement and disposition of cars when made empty, and by reason of these tariff schedules and rules governing the movement and disposition of cars when made empty, this defendant in error was unjustly, unreasonably and illegally discriminated against in that market. The prayer of the petition was for an order requiring and commanding the railroad companies to desist from such unreasonable and illegal discriminations, together with a prayer for reparation.

At about the same time, complaints of a similar nature were filed by other grain dealers operating terminal elevators in the Omaha market. Issue was joined before the Interstate Commerce Commission, evidence taken, and after a full consideration that Commission made its findings of fact and entered its order, as appears by Exhibit 1, p. 29 of the record in this cause. The full report of the Interstate Commerce Commission, together with its opinion, is reported in Vol. 15, I. C. R., 90.

The Union Pacific Railroad Company refused to comply with the order of the Commission and pay the reparation awarded, and thereafter a joint suit was brought by the Updike Grain Company, the Nebraska-Iowa Grain Company, and the Crowell Lumber & Grain Company to recover the amounts awarded them, respectively, by the Interstate Commerce Commission.

A trial was had in the Circuit Court of the United States for the District of Nebraska, and a several judg-

ment entered in favor of each of said shippers in the amount awarded them by the Interstate Commerce Commission.

An appeal was taken by the Union Pacific Railroad Company to the Circuit Court of Appeals for the Eighth Circuit, where the several judgments were affirmed in part, but each party was required to file a remittitur of certain items or amounts which the Court of Appeals held they were not entitled to recover. Such remittiturs were filed by the Updike Grain Company and the Crowell Lumber & Grain Company. The Union Pacific Railroad Company has prosecuted error proceedings to this court from the order of the Circuit Court of Appeals in affirming the several judgments after the remittiturs were filed.

THE EVIDENCE.

On the trial of the case in the Circuit Court of the United States for the District of Nebraska, the defendant in error offered in evidence the findings of fact as made by the Interstate Commerce Commission, together with the order of reparation made by the Commission, and in addition thereto established each and all of the allegations of its complaint by the testimony of witnesses produced in open court.

Plaintiff in error offered no witnesses to contradict or dispute any fact found by the Interstate Commerce Commission or testified to by any witness in open court, so that at the close of all the testimony there was no dispute whatever as to the facts.

The record shows that in June, 1906, the Union Pacific published and filed its freight tariff as follows:

"EXHIBIT A.

I. C. C. 2029,
Union Pacific Railroad Company
Freight Tariff.
Circular
888.

To expedite the movement, and to secure the prompt release and return of equipment, an allowance of one ond one-fourth cents per 100 pounds will be made by the Union Pacific R. R. to the elevators performing the service on grain in carloads, transferred by the elevators at South Omaha, Omaha, Council Bluffs and Kansas City, subject to the following conditions:

1st. The grain must originate at points on Union Pacific R. R. (not connecting lines) west of and including Gilmore, Nebraska, and Muncie, Kansas, and be transported by Union Pacific R. R. from such originating points to South Omaha, Omaha, Council Bluffs, Kansas City, Kansas, or Kansas City, Mo., respectively.

2nd. The allowance will apply only on grain which moves to points beyond Council Bluffs, Iowa, or Kansas City, Mo.

3rd. No allowance will be made when more than forty-eight hours elapse between time of delivery of loads by the Union Pacific to the elevator, or connecting lines, and the release and return of the empty to the Union Pacific. The forty-eight hour limit will be computed from the time of delivery of the loaded by the Union Pacific to elevators located on its own tracks and the release of such cars by those elevators, or from the time of delivery by the Union Pacific to the recognized points of interchange with connecting lines for elevators on lines other than the Union Pacific and the return of the empty car by the connecting lines to recognized points of interchange.

4th. Elevator companies, in presenting their claims

for the above allowance must substantiate, by duly certified records of connecting lines, the reshipment of the grain to points beyond, as above outlined, same to be subject to verification by the Union Pacific R. R. Co.

Issued June 27, 1906. Effective June 27, 1906.

By J. A. Monroe,
Freight Traffic Manager, Union Pacific R. R.,
Omaha, Neb.

Charles J. Lane, 1st A. G. F. A. Union Pacific R. R., Omaha, Neb.	Elmer H. Wood, G. F. A. Union Pacific R. R., Omaha, Neb.
W. H. Garritt, A. G. F. A. Union Pacific R. R., Omaha, Neb.	H. G. Kaill, A. G. F. A. Union Pacific R. R., Kansas City, Mo."

(See Record, Ex. A, p. 9.)

Prior to the publication of this tariff schedule, the Union Pacific Railroad Company and other railroads entering the city of Omaha, constituting the American Railway Association, had adopted rules governing the movement, delivery and use of cars when made empty, and which rules were at all times in full force and were as follows:

"Rule 4. Cars received loaded in switching service must be confined to switching territory *and when made empty must be returned to the owner if a direct connection within that territory* or otherwise to the road from which received, *or may be loaded in accordance with* Rule 2, a, b or c."

Rule 2, a, b and c, referred to in Rule 4, is as follows:

"Rule 2, (a). Loaded via any route so that the home road will participate in the freight rate.

(b) Loaded to the road from which originally received, if such loading is in the direction of the home road, but not otherwise.

(c) Loaded to an intermediate road in the direction of the home road." (Record p. 2, Rule 4.)

During all of this time, the Union Stock Yards Company of Omaha, on whose tracks was located the elevator of the Updike Grain Company, had in effect rules for the handling of cars when made empty and which rules had been published with the sanction and approval of the Union Pacific Railroad Company as follows:

"EXHIBIT C.

Union Stock Yards Company of Omaha (Limited).

Rules to Govern Handling of Box, Furniture, Flat, Coal and Refrigerator Cars, Empty, or when Loaded by Industries Located on Union Stock Yards Company's Tracks.

Effective May 1, 1906, and cancelling Circular of April 15, 1906, empty cars lettered as below, regardless of road via which they may have arrived, will be delivered as follows:

Lettered	Deliver to
C. P. R. R.	U. P. R. R. Co.
G. H. & S. A. R. R.	do
H. & T. C. R. R.	do
L. W. R. R.	do
M. L. & T. R. R.	do
N. Y. T. & M. Ry.	do
O. & C. R. R.	do
O. R. & N. Co.	do
O. S. L. R. R.	do
S. P. R. R.	do
T. & N. O. R. R	do
U. P. R. R.	do
C. & N. W. Ry.	C. & N. W. Ry. Co.
F. E. & M. V. Ry.	do
C. B. Ry.	Mo. Pac. Ry.
C. B. U. P. Ry.	do
F. S. W. & W. Ry.	do
H. C. A. & N. Ry.	do
K. C. & N. W. R. R.	do
L. R. & F. S. Ry.	do
M. P. Ry.	do
St. L. F. S. & W. Ry.	do
St. L. I. M. & S. Ry.	do
S. L. V. Ry.	do"

Lettered	Deliver to
I. C. R. R.	I. C. R. R. Co.
St. L. B. & S. Ry.	do
C. M. & St. P. Ry.	C. M. & St. P. Ry.
B. & M. R. R.	C. B. & Q. R. R. Co.
C. B. & K. C. R. R.	do
C. B. & Q. R. R.	do
H. & St. J. R. R.	do
J. & St. L. Ry.	do
K. C. & St. J. & C. B. R. R.	do
St. L. K. & N. W. R. R.	do
B. C. R. & N. Ry.	C. R. I. & P. Ry. Co.
C. R. I. & E. P. Ry.	do
C. R. I. & G. Ry.	do
C. R. I. & M. Ry.	do
C. R. I. & P. Ry.	do
C. R. I. & T. Ry.	do
C. N. R. R.	do
C. O. & G. R. R.	do
St. L. K. C. & C. R. R.	do
Wabash	Wabash R. R. Co.
C. G. W. Ry.	C. G. W. Ry. Co.
C. St. P. & K. C. Ry.	do

(Record, p. 12, Exhibit C.)

The elevators of the Omaha Elevator Company and the Trans-Mississippi Grain Company, competitors of the defendant in error, were located upon the sidetracks of the Union Pacific Railroad Company. During the period of time covered by the complaint, cars of grain arriving over the Union Pacific, intended for the Updike Grain Company, were received at its elevator and by it unloaded, and the cars when made empty were disposed of in accordance with the provisions of the Union Pacific Tariff Schedule 888 above referred to, the rules of the American Railway Association, and the rules of the Union Stock Yards Company last above quoted.

Cars of grain were received during the same period of time by the competitors of the defendant in error, the Omaha Elevator Company and the Trans-Mississippi Grain Company, the cars being unloaded at their several elevators and when empty disposed of in the manner provided by the foregoing tariff schedule, rules and regulations.

Each of the several elevator companies filed their claims with the Union Pacific for elevation allowance provided for in Tariff Schedule G. F. O. No. 888. The claims of the Omaha Elevator Company and the Trans-Mississippi Grain Company were allowed and paid. The claims of the Updike Grain Company were none of them allowed and none of them paid. It was because of this unjust, unreasonable and illegal discrimination that complaint was filed before the Interstate Commerce Commission, and the damages sustained by the defendant in error by reason of such unjust, unreasonable and illegal discrimination that complaint was filed before the Interstate Commerce Commission and the damages sustained by the defendant in error by reason of such unjust, unrea-

sonable and illegal discrimination constitute the basis of this action.

The claim of the Updike Grain Company, as presented to the Interstate Commerce Commission, was properly divided into four classes, to-wit:

(A) Cars arriving over the Union Pacific that were unloaded and returned to the Union Pacific within the 48-hour period mentioned in the tariff.

(B) Cars arriving over the Union Pacific and which when made empty were returned by the switching line to the owner under Rule 4 of the rules of the American Railway Association.

(C) Foreign cars arriving over the Union Pacific and which when made empty were again loaded to an intermediate road in the direction of the home road, or so that the home road would participate in the freight rate. This in accordance with Rule 2 of the rules of the American Railway Association.

(D) Cars arriving over the Union Pacific, unloaded, and thereafter returned to the Union Pacific, but on which the claim for elevation allowance was denied by the Railroad Company for the sole reason that the car was not returned within the 48-hour period.

The findings of the Interstate Commerce Commission, so far as they apply to the claims of the Updike Grain Company, were as follows:

> "We find in case No. 1655, *Updike Grain Company vs. Union Pacific Railroad Company:*
>
> That the complainant between July 1, 1906, and July 1, 1907, unloaded at its elevator 103 carloads of grain, containing in the aggregate 6,457,140 pounds, where the cars were returned to the Union Pacific within forty-eight hours, and upon

this amount the tariff allowance at the time it was unloaded was 1¼ cents per 100 pounds, or $807.14.

That the said complainant between said dates unloaded 313 cars which belonged either to the road performing the switch service or to a direct connection within the switching territory and which were returned to the owner and never returned to the Union Pacific Company; that such cars contained in the aggregate 20,585,820 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $2,573.32.

That the said complainant between said dates unloaded 355 cars belonging to foreign roads having no direct connection within the switching territory and which were never returned to the Union Pacific Company. That the aggregate contents of said cars were 23,436,960 pounds of grain, and that the elevation allowance of 1¼ cents per 100 pounds, the tariff rate in effect at the time of the unloading, amounted to $2,929.62.

That the said complainant between said dates unloaded 54 cars belonging to foreign roads or to the Union Pacific which were returned to the Union Pacific Company more than forty-eight hours from the time they were received from that company. The contents of these cars aggregated 3,456,230 pounds of grain, and the elevation allowance, according to the tariff rates at the time of the unloading at 1¼ cents per 100 pounds, amounted to $432.02.

We find, therefore, that the complainant Updike Grain Company is entitled to recover of the defendant the sum of $6,742.10, with interest at 6 per cent from July 1, 1907." **Record p. 31.**

On the trial of the case in the Circuit Court, these findings of fact were corroborated by competent witnesses, so that as the record stands, all the findings of

fact by the Interstate Commerce Commission were amply sustained by competent testimony. The Circuit Court gave judgment for the full amount awarded by the Interstate Commerce Commission. The Circuit Court of Appeals, however, denied our right to recover the allowance on cars falling within Class D, namely, those which were returned to the Union Pacific, but which were not returned within the 48-hour period. The Court of Appeals required this defendant to file a remittitur of the amount covered by that sub-division, and after that was done affirmed the judgment for the amount embraced within sub-division A, B and C.

The opinion of the Circuit Court of Appeals is reported in the case of the *Union Pacific R. R. Co. vs. Updike Grain Co.*, 178 Fed., 223. The opinion of Judge Sanborn, who delivered the opinion of the court in that case, together with the opinion of Commissioner Prouty, who wrote the opinion for the Interstate Commerce Commission, and reported in *Updike Grain Co. vs. Union Pacific R. R. Co.*, 15 I. C. C. R., 90, leaves but little to be said in support of our right of recovery.

(A) CARS THAT WERE UNLOADED AND RETURNED TO THE UNION PACIFIC WITHIN THE 48-HOUR PERIOD MENTIONED IN THE TARIFF.

The Interstate Commerce Commission found—and that finding has been confirmed by the Circuit Court and the Circuit Court of Appeals—that between the 1st day of July, 1906, and the 1st day of July, 1907, the Updike Grain Company unloaded at its elevator 103 cars of grain, containing in the aggregate 6,475,140 lbs. of grain, where the cars when made empty were returned to the Union Pacific within the 48-hour period provided for in the tariff. It is conceded that no payment of this elevation allowance has been made.

The agreement on the part of the Union Pacific Railroad Company as contained in this tariff G. F. O. No. 888 was just as much a part of the contract between the Railroad Company and the Updike Grain Company, under which this shipment moved, as was the agreement on the part of the Updike Grain Company to pay the freight provided for in any lawfully published freight tariff. Both tariffs had been published and filed with the Interstate Commerce Commission.

Without any express agreement on the part of the Updike Grain Company, it was obliged to pay the freight provided for in the published rate schedule from the point of origin of this grain to Omaha, but that obligation on the part of the Grain Company was no more binding than the obligation on the part of the Union Pacific Railroad Company to pay this elevation allowance where all the terms and conditions of the published tariff were complied with. The agreements and obligations were mutual and reciprocal.

The Union Pacific Railroad Company transported the cars of grain from the point of origin to the elevator of the Updike Grain Company at South Omaha, and that entitled it to charge, collect and receive the published freight tariff. The service of unloading these cars and returning them to the Union Pacific Railroad Company within 48 hours was actually performed by the Updike Grain Company and that entitled it to charge, collect and receive the allowance provided for in tariff G. F. O. No. 888.

This court has decided in—

Texas & Pacific R. R. Co. vs. Mugg & Dryden, 202 U. S., 242,
Gulf C. & S. F. R. R. Co. vs. Hefflen, 158, U. S., 98,
Texas & Pacific R. R. Co. vs. Abilene Oil Co., 214 U. S., 426—

that the shipper must pay the published tariff, whether such tariff is just or unjust, excessive or otherwise. It is true, the shipper may appeal to the Interstate Commerce Commission and have the rate declared unjust and excessive upon a proper showing, and may then be awarded reparation, but so long as the published rate remains in force, the shipper must pay the amount called for therein. It would be strange, indeed, if these rights and obligations were not mutual and reciprocal.

During all the period of time covered by the claims in controversy, these tariff schedules were in effect and the payments therein provided for were being made to our competitors by the Union Pacific Railroad Company. For that company to now refuse payment to the defendant in error where the services were actually performed as required by the published tariffs, while admitting that payments have been made to our competitors who per-

formed exactly the same service, would be discrimination of the most flagrant character.

The only answer made to this is that the Interstate Commerce Commission, after these several claims accrued, reached the conclusion that this elevation allowance should not thereafter be paid to any transfer elevators, no matter where located. But the allowance provided for in tariff G. F. O. No. 888 was not illegal *per se.* The principle of elevation allowance is not illegal. It is sanctioned and approved by the Act regulating commerce. It is expressly recognized in the Act of Congress that elevation is incident to transportation, and it is made the duty of carriers to furnish the same upon reasonable request thereof.

It has never been held, so far as we are advised, either by the court or Commission, that the principle of elevation allowance is illegal. It is true the Interstate Commerce Commission has held that the amount paid or promised to be paid may be so large as to work an unjust discrimination as a matter of practical operation, but the principle of elevation in the shipment of grain has been sanctioned by congress and recognized by the Interstate Commerce Commission as legal and has received the sanction of the Court of Appeals of the Eighth Circuit.

During the time this service was being performed by the defendant in error, the allowance provided for in these tariff schedules met with the sanction and approval of the Interstate Commerce Commission. It is common knowledge that these tariff schedules G. F. O. No. 888 and G. F. O. No. 904 were issued and published with the knowledge and approval of the Interstate Commerce Commission, and for the very purpose on the part of the

Union Pacific Railroad Company of avoiding the claim that it was discriminating in favor of the Omaha Elevator Company and the Trans-Mississippi Grain Company by reason of the payment to them. Congress had very plainly said in its Act to regulate commerce that it should be unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any person, company, firm or corporation or to subject any person or corporation to any undue or unreasonable prejudice or disadvantage in any respect whatever. It was to meet this requirement and to keep the plaintiffs ostensibly within the provisions of the law that these tariff schedules G. F. O. No. 888 and G. F. O. No. 904 were published.

In the opinion of the Interstate Commerce Commission filed on the 8th day of April, 1907, and reported in Vol. 12 I. C. C. R. 888, that Commission said:

> "The law clearly recognizes elevation as a facility which the carrier may provide, and this authorizes the carrier to grant elevation at destination or while the traffic is in transit, subject only to the restriction imposed by the act that elevation, like any other service offered by the carrier to shippers, must be open to all on equal and reasonable terms."

The opinion in that case was written by Mr. Commissioner Harland, and from that we quote:

> "We adhere to the view expressed in the original report and opinion of the commission that such an arrangement, embracing as it now does all the available elevators at the points named, and not being confined to the Peavey elevators alone, is not in itself unlawful. By whatever name it may be called, the service actually rendered is, in fact, elevation, and may be so regarded under the amended act. It must be understood, how-

> ever, that if such elevation is furnished by the Union Pacific Railroad for the grain of one shipper over its lines, proper arrangements must be made by it for furnishing elevation to other shippers over its lines, for otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination against other shippers, who, for any reason, cannot use the Peavey (Omaha Elevator Co.) elevators."

This opinion was handed down during the time that the service for which these claims were made was being performed. It will thus be seen that during the time that the Updike Grain Company was performing the service for which this suit was brought, the payment of this allowance met with the approval of the Interstate Commerce Commission, and the only condition imposed by it was:

> "That elevation, like any other service offered by the carrier to shippers, must be open to all on equal and reasonable terms." (Opinion of commission, *supra.*)

And it was expressly stated by the Commission in its opinion in that case that:

> "It must be understood, however, that if such elevation is furnished by the Union Pacific Railroad for the grain of one shipper over its lines, proper arrangements must be made by it for furnishing elevation for other shippers over its lines or otherwise the company would subject itself to the charge of practicing an unjust and unlawful discrimination." (Same.)

In that proceeding before the Commission, as well as other hearings before that body where the same question was involved, the Union Pacific Railroad Company defended its right to publish this tariff and pay the eleva-

tion allowance to the Omaha Elevator Company and the Trans-Mississippi Grain Company. Its agility is demonstrated by the readiness with which it defends that allowance when its right to pay it to our competitors was questioned and its readiness and eagerness to assail the provisions of its own tariff as illegal when it is sought to compel the payment of the same allowance to this defendant in error.

The Interstate Commerce Commission in its opinion filed in this case, 15 I. C. C. R. 90, makes a complete answer to the contention of the plaintiff in error touching these claims, and we think effectively disposes of this question in the following language:

> "We have never held that the payment of these elevation allowances were unlawful *per se*. We have held that such payment worked a discrimination. At first, we were of the opinion that under all the circumstances such discrimination ought not to be pronounced undue, and therefore unlawful. Subsequently, upon a wider range of vision, and especially in view of the results of our previous holding, we reached a contrary conclusion. Although such a conclusion has been reached and announced, the practice is still continuing with the approval of the commission. We have postponed the effective date of our order for the purpose of permitting the interests involved to obtain a judicial determination of its lawfulness, and we have suggested that in the interim the payment of these allowances should not be disturbed by reason of our holding. This commission cannot, without stultifying itself, make any ruling which will condemn as unlawful the payment of these elevation allowances during the time they have been expressly sanctioned by our decisions. We are clearly of the opinion and hold that payment should be made on cars of all kinds which admittedly fall within the provision of these tariffs."

Even if it were true that the payment of this elevation allowance had been declared illegal either by the Interstate Commerce Commission or by any court of competent jurisdiction, all that, we submit, would be no answer whatever to the claims made by the defendant in error. This is an action for unjust and illegal discriminations. It is not an action based upon contract. The basis of the action is the wrongful conduct of the plaintiff in error in practicing unjust and illegal discriminations against this defendant in error.

Our contention is that the carrier has granted to our competitors rights and privileges and has made payments to them in connection with shipments that it has refused to make to this defendant in error under exactly the same conditions. The evidence clearly establishes the truth of these charges. The Interstate Commerce Commission found the facts to establish such unjust and illegal discriminations. Such finding of fact has been sustained by the Court of Appeals.

This court announces the rule in the case of *Central Ry. Co. vs. Interstate Commerce Commission,* 206 U. S. 441, as follows:

> "Findings of fact made by the Interstate Commerce Commission, when concurred in by a Federal Circuit Court, will not be disturbed unless the record establishes that clear and unmistakable error has been committed."

Mr. Justice McKenna, speaking for the court in that case, said:

> "A probative force must be attributed to the findings of the Commission which, in addition to 'knowledge of conditions or environment and of transportation relations,' has had the witnesses before it and has been able to judge of them and

> their manner of testifying. In the case at bar, these considerations are reinforced by a concurrent judgment of the Circuit Court."

In the case of *C. H. & D. R. Co. vs. Interstate Commerce Commission*, 206 U. S. 142, the Circuit Court of the United States, speaking through Mr. Justice White, said:

> "The statute gives *prima facie* effect to the findings of the Commission, and when those findings are concurred in by the Circuit Court we think they should not be interfered with unless the record establishes that clear and unmistakable error has been committed."

The evidence clearly establishes the truth of all the charges made by this plaintiff in error before the Interstate Commerce Commission. It clearly establishes that these payments were made to our competitors and denied to us, even after we had performed exactly a similar service. Such being the case, the question as to whether or not the payments made to our competitors were legal or illegal is wholly immaterial. If it be conceded that they were wholly illegal, the case is made worse, rather than better, for the plaintiff in error.

The Act of Congress regulating commerce expressly forbids the plaintiff in error—

> "To make or give any undue or unreasonable preference or advantage"—

to our competitors, and by express terms makes the plaintiff in error liable—

> "To the person or persons injured thereby for the full amount of the damages sustained."

If the carrier has given to our competitors that which the law condemns, to-wit, undue or unreasonable preferences or advantages, and we have been damaged

thereby, it would be strange, indeed, if in a suit to recover the amount of our damages the carrier could plead that such preferences thus given to our competitors were illegal and thereby defeat our claim for damages.

Let us assume that during the period covered by this controversy, the plaintiff in error had secretly and in violation of law given to the Omaha Elevator Company and to the Trans-Mississippi Grain Company, our competitors in the grain market in the state of Nebraska, a secret rebate of $5.00 per car on every car of grain purchased by them and received over the line of road of the plaintiff in error. It needs no argument or citation of authorities to show that such payment would have been entirely illegal and that the plaintiff in error would thereby have subjected itself to criminal prosecution; neither does it require any argument to show that by this course of conduct our competitors would have been receiving undue and unreasonable preferences and advantages over this defendant in error, who was likewise buying grain and shipping the same over the line of the Union Pacific Railroad Company. It can readily be understood that such payments would enable our competitors to literally put us out of business.

If on discovering that fact and learning of such payments, the defendant in error had brought proceedings to recover damages, could the plaintiff in error successfully defend by pleading that secret rebates thus given to our competitors were illegal? Clearly not. If such a defense could be successfully interposed, then there could never be a case where one shipper could recover damages after being driven out of business, where it could be shown that the preferences given to his com-

petitor had been secretly made and were, therefore, illegal.

It may be said that criminal proceedings might be instituted against the Railroad Company for paying these secret rebates to a competitor. But it would be small consolation, to say nothing of compensation, to a shipper who had been put into bankruptcy because of these discriminations practiced in favor of his competitor, to know that the carrier might be punished in a criminal proceeding. Congress never contemplated that such should be the only remedy, and it expressly provided that—

> "Such carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation of the provisions of this act."

We think it necessarily follows that if there had been no published tariff providing for this payment (in which event the admitted payments to the Omaha Elevator Company and the Trans-Mississippi Grain Company would clearly have been illegal) still this defendant in error would be entitled to recover. If our competitors received from the Union Pacific Railroad Company the allowance provided for in G. F. O. No. 888 and we are not permitted to receive it, it certainly does not require any argument or citation of authorities to convince any reasonable mind that we are unjustly discriminated against and that such payment to our competitors denied to us works to our damage and clearly falls within the terms of the Act to regulate commerce above quoted.

It may be contended by counsel that after this elevation allowance had been condemned by the Interstate Commerce Commission, payment could not thereafter lawfully and voluntarily be made to this defendant in

error, and that the court should not compel the payment of that which it could not voluntarily pay. We submit this conclusion does not follow and is wholly unwarranted.

If the carrier has secretly given rebates to our competitors, thereby enabling them to drive us out of the market, the carrier could not upon the discovery of such illegal practices, voluntarily pay a like amount to us. But the fact that it could not voluntarily pay the amount to us would not prevent a court of competent jurisdiction from giving us judgment for the amount of our damages in a proper proceeding. Many complaints have been heard by the Interstate Commerce Commission and reparation awarded by it in cases where the carrier could not, without such order first being entered, make such payment to the shipper, but after the reparation has been awarded by the Commission that payment could be made in a proper proceeding to enforce the order of the Commission the carrier could not defend simply on the ground that it could not unlawfully have paid the money before the order was made.

Reparation was awarded by the Commission in the following cases:

Leonard vs. M. K. & T. Ry. Co., 12 I. C. C. R., 583,
Hennepin Paper Co. vs. Northern Pacific Ry. Co., 12 I. C. C. R., 535,
Farmers Warehouse Co. vs. L. & N. R. Co., 12 I. C. C. R., 520,
Cambria Steel Co. vs. Great Northern Co., 12 I. C. C. R., 466,
Kehoe & Co. vs. Evansville & T. H. R. Co., 11 I. C. C. R., 172,
Hope Cotton Oil Co. vs. Tex. & Pac. Ry. Co., 10 I. C. C. R. 696.

In not a single one of those cases could the carrier lawfully have made the payment awarded by the Commis-

sion prior to such hearing before the Commission. To have done so would clearly have been illegal. But after the Commission found that the rate in the several cases was unreasonable and ordered reparation to be made to the shipper, the payment could not only be lawfully made, but its payment would be enforced by the courts.

The plaintiff in error seems to lose sight of the fact that this is a suit for damages because of unlawful and unreasonable discriminations brought by the plaintiff in error whereby this defendant in error has been damaged. It was to meet just such cases of discrimination as these that the Act to regulate commerce was enacted.

In the case of *N. Y. & N. H. R. R. Co. vs. Interstate Commerce Commission,* 200 U. S. 361, it was said:

> "It cannot be challenged that the great purpose of the act to regulate commerce, while seeking to prevent unjust and unreasonable rates, was to secure equality of rates and to destroy favoritism. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as the public agent, to give equal treatment to all."

Note the language: Its purpose was to secure equality and destroy favoritism. It was to compel the carrier as a public agent to give equal treatment to all. Its purpose is not accomplished if the Union Pacific is permitted to make the payment of this elevation allowance to our competitors and at the same time refuse to make payment to ourselves. If the Union Pacific has the power to do this, then favoritism is not destroyed and equal treatment is not given to all, but the Union Pacific may select those who are to be the recipients of its bounty and bestow its favors as it may think proper and deny them at its pleasure.

(B) CARS ARRIVING OVER THE UNION PACIFIC AND WHICH WHEN MADE EMPTY WERE RETAINED IN THE POSSESSION OF THE SWITCHING LINE OR THE OWNER OF THE CAR.

The Interstate Commerce Commission made the following finding:

> "That said complainant" (the Updike Grain Company) "between said dates unloaded 313 cars which belonged either to the road performing the switching service, or to a direct connection within the switching territory, and which were returned to the owner and never returned to the Union Pacific Company; that such cars contained in the aggregate 25,585,820 pounds of grain and that the elevation allowance of 1¼ cents per hundred pounds, the tariff rate in effect at the time of unloading, amounted to $2,573.32."

The defendant in error, the Updike Grain Company, was awarded reparation for the amount stated in this finding.

It is admitted in the pleadings that during the period covered by these complaints all the railroads in Omaha, including the Union Pacific, were members of the American Railway Association. It is further admitted that this association had published rules governing the movement and disposition of cars when made empty, and which rules were as shown on page 2 of record.

It is also admitted that during the time the service was being performed, the Union Stock Yards Company of South Omaha, on whose track, was located the transfer elevator of the Updike Grain Company, had adopted rules governing the movement and disposition of cars when made empty and which rules were as shown on page 12 of the record herein.

These rules so adopted by the Union Stock Yards

Company were made with the knowledge, consent and approval of the plaintiff in error.

Mr. James Brady, superintendent of the Union Stock Yards switching department, testified to the preparation of this circular and submitting it to all the railroads in Omaha for their approval. He testified as follows:

> "Previous to the issuing of this circular I had taken up the matter of the return of foreign cars received from the roads at South Omaha, and I had sent them—each of the roads—a copy of the circular that I proposed to issue if it was agreeable to them. Those copies of this circular were returned to me, some of them with amendments and some of them without amendments, and after securing the assurance of the different roads that with the corrections or amendments they suggested the circular would be satisfactory, it was issued." (See record, p. 86.)

The assent of the Union Pacific was obtained in writing, but the witness was unable to locate, at the time of giving his testimony, the letter he had received. His recollection was that the assent in writing had been given him by Mr. Ware, the superintendent of the Union Pacific. (Record pp. 86, 87, 88, 89.)

Under these rules of the American Railway Association, all cars arriving over the Union Pacific—

> "When made empty must be returned to the owner if a direct connection within that territory."

The same effect was accomplished by the rules of the Union Stock Yards Company, which expressly provide:

> "Empty cars lettered as below, regardless of the road via which they have arrived, will be delivered as follows."

As applied to the facts in this case, these rules mean

that a Burlington system car, brought in by the Union Pacific and switched to the elevator of this defendant in error on the tracks of the Union Stock Yards, when made empty would not be returned to the Union Pacific, but must be returned to the Burlington. If it went to the elevator of the Nebraska-Iowa Grain Company, that elevator being located on the Burlington tracks, it would, when made empty, be retained by the Burlington road in its possession.

Mr. Brady, the witness last referred to, in explanation of these rules, said:

"Q. After this circular was issued—just explain to the jury a little what is within that—if a car was unloaded at the elevator of the Updike Grain Company that belonged to—we will say—the Rock Island road, what was done with that car when it was made empty by the Stock Yards Company?

"A. Under this circular it was returned to the Rock Island road.

"Q. And is that true irrespective of the road over which it has come into Omaha?

"A. Into South Omaha, yes, sir.

"Q. No matter whether it came over the Union Pacific, the Burlington, or whatever road it was, when it was made empty it was returned to the Rock Island?

"A. Yes, sir.

"Q. And that was true of all roads having lines in South Omaha, was it?

"A. Yes, sir." (Record, p. 87.)

In considering our claim for elevation on these cars, the Interstate Commerce Commission said:

"As already stated, the Union Stock Yards Company has direct connection with most railway systems entering Omaha. The larger part of the foreign

> cars unloaded at the Updike elevator belong to these systems. It was, therefore, the positive duty of the Stock Yards Company, in accordance with its circular and with the rules of the Railway Association, to make delivery of these cars when empty to their owners. * * * Certainly the Union Pacific Company cannot insist that the Stock Yards Company shall violate the very rules which it has been instrumental in establishing and upon the observance of which it is daily insisting as a condition precedent to obtaining the payment of this elevation allowance by the Updike elevator. In both cases the compliance with the 48-hour provision is impossible when the elevator is not situated upon the rails of the Union Pacific."

The Interstate Commerce Commission in its opinion answers every objection that can be urged to claims based on cars which, when made empty, were retained in the possession of the owner.

It is admitted in the testimony that our competitors were paid this elevation allowance on all grain arriving in cars belonging to roads having lines in Omaha.

Mr. Anderson, the auditor of the Union Pacific, testified as follows:

"Q. Tell the jury whether or not during all the time when you were paying this allowance to the Omaha Elevator Company or to the Trans-Mississippi, did you pay it merely on Union Pacific cars that were unloaded or did you pay it on foreign cars as well?

"A. Paid it on all cars that were unloaded during that time.

"Q. If it was a Burlington or a Northwestern car it was paid just the same?

"A. Yes, sir.

"Q. Or a Baltimore & Ohio car?

"A. Yes, sir.

"Q. The ownership of the car, whether it was Union Pacific or whether owned by a foreign road, cut no figure?

"A. Cut no figure, no, sir." (Record, p. 37.)

If the Union Pacific pays to our competitors this elevation on cars belonging to roads having lines in Omaha, as, for example, the Burlington, the Rock Island, the C., St. P., M. & O., or the Illinois Central, and then by rules which it has assisted in making and which it has approved, makes it impossible for this defendant in error to return such cars to the Union Pacific, it must be very plain that this works rank discrimination against us and in favor of our competitors.

Let us illustrate: Six cars of grain arrive over the Union Pacific from Grand Island, Nebraska. Two of these are Burlington cars, two Rock Island cars, and two C., St. P., M. & O. cars. The Omaha Elevator Company purchases three of these cars, and it develops that of the cars of grain it has purchased, one is loaded in a Rock Island car, one in a Burlington car, and one in a C., St. P., M. & O. car. The Updike Grain Company buys the other three cars and finds the grain it has bought is loaded in the same character of car, namely, one Burlington, one Rock Island, and one C., St. P., M. & O.

The three cars purchased by the Omaha Elevator Company are switched to this Elevator Company and there unloaded. On these cars it is conceded that the Omaha Elevator Company received the full allowance, although none of the equipment belonged to the Union Pacific. The testimony of Mr. Anderson is plain to the effect that the allowance was paid on all of these cars.

On p. 27 of the record Mr. Anderson says:

"Q. Tell the court and jury whether or not during all

that time when you were paying this allowance to the Omaha Elevator Company or to the Trans-Mississippi, did you pay it merely on Union Pacific cars that were unloaded or did you pay it on foreign cars as well?

"A. Paid it on all cars that were unloaded during that time.

"Q. If it was a Burlington or a Northwestern car it was paid just the same?

"A. Yes, sir.

"Q. Or a Baltimore & Ohio car?

"A. Yes, sir.

"Q. The ownership of the car, whether it was Union Pacific or whether owned by a foreign road, cut no figure?

"A. Cut no figure, no, sir."

The Updike Grain Company unloads its cars, but under the rules of the Union Stock Yards Company above referred to these several cars when made empty would be turned over, respectively, to the Burlington, Rock Island, and the C., St. P., M. & O. In no event could they be delivered back to the Union Pacific.

This necessarily followed from the terms of the Stock Yards rules governing the disposition of empty cars to which reference has been made. The result was that our competitor received the full elevation allowance on the three cars purchased by it, while this defendant in error received no allowance whatever. This was not due to any fault on the part of this defendant in error, because to return the empty cars to the Union Pacific was entirely without its power. This rule of the Union Stock Yards Company having been made with the knowledge and approval and acquiescence of the Union Pacific Railroad Company, delivery to the road owning the car was equivalent to a delivery to the Union Pacific Railroad Company.

Judge Sanborn so regarded it, and said:

> "It was impossible for the defendant in error, under the controlling rules, to return cars of this class to the Union Pacific Company at any time, and the inevitable effect of the payment of the elevation charge on such cars to Peavy & Co. (Omaha Elevator Company) when the defendant in error could not secure it under the specifications of the tariffs, was to give shippers of this class through the elevators of Peavey & Company (Omaha Elevator Company) a clear advantage of the amount of the elevation charge over shippers in cars of the same class through the elevators of the defendant in error. There was therefore no error, in the opinion of the Commission and of the court below, that this difference in operation and payment constituted an unjust discrimination which entitled the defendants in error to damages in reparation."

It is contended by the Railroad Company, however, that this is the result of the published tariff, and therefore must be complied with. But if the Union Pacific has published a tariff, the result of which is necessarily to give one class of shippers an advantage over the other, it cannot defend merely by showing it has published such a discriminatory tariff.

In the matter of the six cars last above referred to, it will be observed that whatever might be the request of the Updike Grain Company, and however prompt it might be in the matter of unloading these cars, the empty cars would not be returned to the Union Pacific at all, but would be returned to the several roads owning the cars. Can the Union Pacific make an agreement with the owners of these several cars such as is made by the rules of the Union Stock Yards Company under which these

cars when made empty must be returned to the road owning the car, and thus deprive this defendant in error of the claim for elevation while our competitors are receiving elevation on identically the same class of cars? The fact that this discrimination is accomplished by published tariffs and published rules and regulations does not relieve it of its odium.

It was well said by the Interstate Commerce Commission in the case of *Carr vs. Northern Pacific R. R. Co.*, 9 I. C. C. R. 1:

> "Rates may be fair and reasonable for the service rendered, and from the carrier's standpoint justly related to other charges, and yet, if a low rate is granted on conditions with which only a few can comply, that rate is presumably unfair and wrongfully prejudicial to all other shippers of like traffic, because they are practically unable to meet the terms on which it is offered."

And in the case of *Cope vs. Railway Co.*, 13 I. C. C. R., 523, the Commission said:

> "The authority and duty of the Commission under the law to award damages in reparation of unjust discriminations forbidden by the Act extends as well to such discriminations as are affected by published rate schedules as to those affected by departure therefrom."

By this published tariff the Union Pacific has agreed to pay for unloading these cars, and as a matter of fact to make payment to the Omaha Elevator Company and the Trans-Mississippi Grain Company where the grain arrived in cars of the character now under consideration. But by reason of the rules of the Union Stock Yards Company, made with the approval of the Union Pacific

Railroad Company, it is impossible for this defendant in error to return these cars to the Union Pacific. The effect, therefore, of this is that our competitors receive the allowance on grain arriving in Burlington, Rock Island, Milwaukee, Wabash, Illinois Central, Northwestern, Missouri Pacific, or Great Western cars, but this defendant in error could receive no allowance where it bought grain arriving in the same class of equipment.

True, the Union Pacific does not want these cars returned to it. It has no further use for them, and naturally desires to avoid the payment of the per diem charge, and therefore is not only willing but anxious that the Union Stock Yards Company should return the cars when made empty to the several roads owning the same. When this conduct on the part of the Union Pacific is read in the light of Sec. 3 of the Act to regulate commerce, it must be very plain to any one that by reason of this course of dealing the Union Pacific is giving unreasonable preferences and advantages to our competitors. Such was the opinion of the Interstate Commerce Commission and such was the conclusion reached by the Circuit Court of Appeals.

(C) CARS ARRIVING OVER THE UNION PACIFIC, WHICH, AFTER BEING MADE EMPTY, WERE AGAIN LOADED TO AN INTERMEDIATE ROAD IN THE DIRECTION OF THE HOME ROAD, SO THAT THE HOME ROAD WOULD PARTICIPATE IN THE FREIGHT RATE.

What has been said in support of our right to recover the allowance on cars falling within sub-division B applies equally to those falling within sub-division C. These are cars belonging to foreign roads having no lines in Omaha, but which cars when made empty were loaded out in the direction of the home road or so that the home road would participate in the freight rate. This covers such cars as New York Central cars, Pennsylvania cars, Baltimore & Ohio cars, and cars that arrive over the Union Pacific, but which belong to some carrier having no line in Omaha.

These cars when arriving over the Union Pacific are unloaded either by the Omaha Elevator Company, the Trans-Mississippi Grain Company, the Updike Grain Company, or such company as purchases the grain contained within the cars, and after these cars are unloaded they are then loaded out in the direction of the home road.

The rules of the American Railway Association to which reference has been had provide that these cars when made empty might be—

> "(a) Loaded via any route so that the home road would participate in the freight rate.
> "(c) Loaded to an intermediate road in the direction of the home road."

It will also be remembered that the circular issued by the Union Stock Yards Company controlling the movement of these foreign cars contained the express provision that—

"Foreign cars received from the U. P. R. R. Co. may be delivered loaded as routed."

Referring to our claim for elevation on these cars, the Interstate Commerce Commission said:

"The rules of the American Railway Association already referred to require that the car shall be returned when empty to its owner when that owner has a direct connection within the switching territory. In such case, the road in whose possession the empty car is, has no option. The car cannot be returned to the Union Pacific Company. When, however, the car is the property of some railroad having no such connection, it may either be returned to the railroad from which it was received or loaded out in such way that the road owning it will participate in the haul. Apparently it is optional with the switching road to determine whether it shall be returned or loaded out. The elevator cannot direct the disposition of the car. If this is so, the condition in case of the foreign car not owned by a direct connection is just as impossible of execution as if the car were the property of a direct connection, since the elevator company cannot in either event secure a return of the car. * * * If the shipment is made to the Omaha Elevator Company in either a Burlington or a Baltimore & Ohio car, that elevator must of necessity receive the allowance. But if the Baltimore & Ohio car is sent to either the Nebraska-Iowa elevator or the Updike elevator, the allowance may not accrue, since it may not be possible to return that car to the Union Pacific at any time. The shipper who has shipped grain to Omaha and holds it for sale upon inspection tracks of the Union Pacific in a Burlington car can obtain more for that car from the Nebraska-Iowa elevator by 1¼ cents per hundred pounds than if the same grain had been loaded and shipped in a Baltimore & Ohio car. This discrimination results not from any lack of diligence on the part of the shipper

> nor from any disadvantage of location on his part, but entirely from the acts of the Union Pacific Company itself. In our opinion a condition which necessarily results in discrimination of this sort cannot be a reasonable or lawful requirement, and we are constrained to hold that as applied to foreign cars of all descriptions, the 48-hour provision is void."

Judge Sanborn, speaking for the Court of Appeals in considering our right to elevation on these cars, said:

> "For the same reason there was no error in allowing to the Updike Company for the failure of the Union Pacific Company to pay the elevation charge on grain unloaded from foreign cars, that is, from cars owned by companies which had no railroads into Omaha or South Omaha, such as the Pennsylvania Company, or the New York Central Company. Cars of this character were required by the rules of the Association to be and they were, when emptied, loaded by some route so that the home road would participate in the freight rate or loaded to an intermediate road in the direction of the home road. The result was that when these cars came to the elevator of the Updike Company from the Union Pacific Company and were unloaded the Updike Company could not return them to the Union Pacific Company. That Company paid the elevation charge upon cars of this class to Peavey & Company and its failure to pay it to the Updike Company wrought an unjust discrimination on account of which the Updike Company was entitled to recover the damages which it sustained."

The evidence is undisputed that upon these foreign cars such as the New York Central, Pennsylvania, or Baltimore & Ohio cars, our competitors have at all times received this allowance.

Mr. Joel H. Wright, who was connected with the Omaha Elevator Company during the entire period of

time covered by these complaints and whose duty at that time it was to look after the collection of this allowance, testified as follows:

"Q. In making up these claims which were afterwards paid, did you include in that grain which arrived in Union Pacific cars and also grain that arrived in cars owned by lines here in Omaha and grain that arrived over the Union Pacific in cars that were owned by foreign lines having no connection in Omaha?

"A. Those claims included all cars received off the line of the Union Pacific Railroad Company.

"Q. Irrespective of the ownership of the car?

"A. Yes, sir.

"Q. And paid on the same basis?

"A. Yes, sir.

"Q. The Union Pacific did not cut out of your claims allowances on cars belonging to the Burlington, or the Rock Island, or the Milwaukee?

"A. No, sir.

"Q. And they did not cut out of your claim elevation on cars belonging to the New York Central, Baltimore & Ohio, Pennsylvania, or anything of that kind?

"A. No, sir.

"Q. They were paid the same as grain received in the Union Pacific equipment?

"A. Yes, sir.

"Q. Was there any kind of car or equipment during that time that you did not get elevation on?"

"A. No, sir.

"Q. No matter what became of the car after it was made empty?

"A. No, sir." (Record, pp. 152-3.)

Referring to the use of these foreign cars now under consideration, this witness testified as follows:

"Q. In that claim did you include cars belonging to eastern lines having no connection in Omaha,

which cars had been received over the Union Pacific and which cars when made empty were immediately loaded out by the Omaha Elevator Company to some point east or south?

"A. Yes, sir.

"Q. If a Baltimore & Ohio car arrived over the Union Pacific and was unloaded at that elevator, then immediately loaded out with the same kind of grain, or with some other kind of grain for that matter, for Chicago or the east, did they pay elevation allowance on that car?

"A. Frequently we loaded cars before they had left the elevator and billed them out over any line we saw fit.

"Q. My question was, if a Baltimore & Ohio car arrived over the Union Pacific and was unloaded at that elevator and immediately loaded out with the same kind of grain, or some other kind of grain, for Chicago or the east, did they pay elevation allowance on that car?

"A. Yes, sir.

"Q. Is that true of all foreign cars which were loaded out east or south after being made empty?

"A. Yes, sir." (Record, p. 153.)

Further testifying on this point the witness said:

"Q. And you have made up those claims on the car that was unloaded and never left the elevator after it was unloaded, you did that did you?

"A. Yes, sir; you mean that the empty never left the elevator?

"Q. You made the claim on that car which you unloaded and never pushed out on the Union Pacific, but immediately reloaded it, you put in a claim for that?

"A. Never left the elevator track?

"Q. Yes, never left the elevator track?

"A. Yes, we did.

"Q. You put in a claim for that?

"A. Yes, sir." (Record, p. 157.)

It will thus be seen that our competitors were permitted to unload these foreign cars and immediately thereafter reload them for some point east or south, and receive the elevation allowance thereon. But when the Updike Grain Company unloads exactly the same kind of a car and then when that car is loaded out to some point east or south, either by the Updike Grain Company or any other industry on the tracks of the Union Stock Yards Company, its claim for allowance is denied.

Can there be any question about this being unreasonable discrimination? Can there be any question as to whether or not our competitors are thus given unjust and unreasonable preferences and advantages over us? Under such conditions is it not a mere question of time until our competitors can drive us out of the field?

The shipper has nothing to say as to the ownership of the car in which his grain shall be transported. He must take the car that is furnished him. If the rule which the plaintiff in error invokes and the practice it has indulged in is sanctioned, then the value of a man's carload of wheat to the Updike Grain Company is made to depend upon the ownership of the car in which it is transported.

Referring to these foreign cars, Mr. Brady, the superintendent of transportation of the Stock Yards, testified as follows:

"Q. Under those rules, if a New York Central car, for example, came in over the Union Pacific road for any industry that was on the tracks of the Union Stock Yards Company, when that car was made empty if that industry desired to reload that New York Central car, what was done with it?

"A. They were permitted to reload it if they wanted

to—if they wanted a New York Central car—if they wanted to load a New York Central car.

"Q. If they wanted to load it in the direction of the home road they were permitted to do that?

"A. Yes, sir." (Record, pp. 87-8.)

"Q. Now if a Pennsylvania car came in over the Rock Island loaded with grain for the Updike elevator, when it was unloaded what would you do with that Pennsylvania car?

"A. It would have been returned to the Rock Island road.

"Q. If it came in over the Union Pacific what would be done with it?

"A. It would have been delivered to any road by which the Updike Grain Company might have routed it.

"Q. That is provided they had loaded it out?

"A. Yes, sir.

"Q. That applies, then, to all roads except the Union Pacific road?

"A. Yes, sir."

That is because of the express provision in this circular of the Stock Yards issued with the consent and approval of the Union Pacific, wherein it is expressly provided that—

"Foreign cars received from the U. P. R. R. Company may be delivered loaded as routed."

It has been well settled that rebates, preferences and illegal discriminations cannot be granted under the disguise of a rate or regulation.

In the case of *Wright vs. United States,* 167 U. S., 512, the Supreme Court of the United States, in speaking of the law regulating commerce, said:

"It was designed to compel every carrier to give equal rights to all shippers over its own road and it forbids it by any device to enforce higher charges against one than another. * * * Section 6 of the Act as amended throws light upon the intent of the statute, for it requires the common carrier in publishing schedules to state sep-

> arately the terminal charges and any rules or regulations which in any wise change, affect or determine any part or the aggregate of such aforesaid rates and fares and charges. It was the purpose of the section to enforce equality between shippers, and it prohibits any rebate or other device by which two shippers shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay the different prices therefor."

In justification of their payment of this allowance to our competitors and their refusal to pay it to us, a contract entered into at one time between the Union Pacific Railroad Company and Peavey & Company (Omaha Elevator Company) was offered in evidence, but the repeated decisions of this court have established the rule that the existence of an outstanding contract, even though made prior to the amendment to the Interstate Commerce law, cannot justify the granting of illegal preferences.

This is well shown in the case of *Armour Packing Co. vs. the United States,* 209 U. S., 56 (28 S. C. R., 428), and cases therein cited. This defendant in error is not objecting to any reasonable rule or regulation which forces it to unload cars within a reasonable time. We are not objecting to being penalized if we fail to do so. What we are protesting against is being penalized because of matters over which we have no control and because of conditions which are brought about by the rules and regulations which the Union Pacific Railroad Company has made or to which it has given its sanction and approval.

It was a party to the rules of the American Railway Association, and approved the rules and regulations of the Union Stock Yards Company, the effect of which

make it impossible for cars falling within Class B and Class C to be returned to the Union Pacific Railroad Company after being unloaded at the elevator of the Updike Grain Company. This defendant in error has nothing to do with the making of these rules and is in no wise responsible for their existence. But it must be plain that these rules have been so framed as to give to our competitors unjust and unreasonable advantages over us. The Interstate Commerce Commission so found, and both the Circuit Court and the Circuit Court of Appeals have concurred in that finding.

Let it at all times be borne in mind that this action is one in tort to recover damages caused by unjust and illegal discriminations practiced against this defendant in error. This is not an action upon a contract. It is not an effort to recover because of some contract. The action is strictly one in tort to recover damages to which the Act to regulate commerce says we are entitled. The question as to whether or not the moneys paid to our competitors were paid lawfully or unlawfully is wholly immaterial. We have charged the plaintiff in error with unlawfully discriminating against us and in favor of our competitors, and the evidence fully sustains these allegations.

The Act of Congress regulating commerce expressly provides that if this has been done—

> "Such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act."

The Interstate Commerce Commission upon full investigation found the facts to establish that undue and unreasonable preferences and advantages have been

given to our competitors. That finding of fact has been sustained by the Circuit Court and by the Circuit Court of Appeals. The rule laid down by this court in the case of *Central Railway Co. vs. Interstate Commerce Commission*, 206 U. S., 441, that—

> "Findings of fact made by the Interstate Commerce Commission, when concurred in by the Federal Circuit Court, will not be disturbed unless the record establishes that clear and unmistakable error has been committed"—

should be applied in this case. We invoke the rule announced by this court in the case of the *Interstate Commerce Commission vs. the Chicago, Rock Island & Pacific R'y Co., et al.*, 218 U. S. 88 (30 S. C. R. 651), where it was said:

> "We have said that the act to regulate commerce was intended to be an effective means for redressing wrongs resulting from unjust discrimination and undue preference, and this must be so, whether persons or places be sufferers. *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075. We have also said that the primary jurisdiction is with the Commission, the power of the courts being that of review, and is confined in that review to questions of constitutional power and all pertinent questions as to whether the action of the Commission is within the scope of the delegated authority under which it purports to have been made. *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 478, 54 L. ed. ....., 30 Sup. Ct. Rep. 155–163.)"

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

CONSTANTINE J. SMYTH,
EDWARD P. SMITH,
Attorneys for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Nos. 353, 354, 355, and 356.

UNION PACIFIC RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

THE UPDIKE GRAIN COMPANY,
DEFENDANT IN ERROR.

ADDITIONAL BRIEF FOR DEFENDANT IN ERROR.

This cause was advanced and set for hearing on October 10, 1911. The brief of the plaintiff in error was filed in the clerk's office on the 9th day of October, 1911, and after our brief had been filed.

We are not at all criticising counsel for the plaintiff in error, nor finding fault with their failure to file the brief in the time required by the rules of this court, but mention these facts as an excuse for the filing of this additional brief.

The general principles of law applicable to this case, as we understand them, are discussed in the original brief filed by us in this case and we will not repeat them in this brief. We cannot refrain from adding that, as we read the brief of counsel for plaintiff in error, they entirely misapprehend the case sought to be made by the defendant in error. Their whole brief, as we read it, proceeds on the theory that this is an action based on contract, and that the defendant in error is seeking to enforce rights growing out of a contract. Such is not the case. The action is one in tort, based entirely upon alleged illegal and unjust discrimination practiced by the plaintiff in error whereby the competitors of this defendant in error were given rights, privileges, and benefits in connection with the transportation of carloads of grain over the line of road of the plaintiff in error, and which rights, privileges, and benefits were unjustly and illegally denied to this defendant in error, to its damage. It was because of this unlawful and illegal discrimination that complaint was made to the Interstate Commerce Commission; it was because of this unjust and illegal discrimination that the Interstate Commerce Commission awarded us reparation, and it was because of this unjust and illegal discrimination that the Circuit Court for the District of Nebraska and the Circuit Court of Appeals of the Eighth Circuit approved the award of the Interstate Commerce Commission and entered judgment in our favor. We en-

deavored to make this plain in our original brief, and, if we have not already done so, will be unable to in this additional brief.

Counsel for plaintiff in error contend that the evidence was wholly insufficient to warrant a verdict in favor of the defendant in error, and say in their brief, on page 45:

> "Practically no proof of the performance of the service required to satisfy the tariff was attempted, except by introducing the findings of the Commission."

An examination will show that such statement is hardly warranted by the state of the record; but even if it were true, we think the proof would be sufficient to sustain the verdict and judgment.

The act to regulate commerce, section 16, provides, in part, as follows:

> "Such suit in the circuit courts of the United States shall proceed in all respects like all other civil suits for damage, except that on the trial of such suits the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated."

Let us turn now to the findings of the Commission so far as they apply to the Updike Grain Company, and see what the findings and the order are. They are found on pages 31 and 33 of the record. Examination of those findings will show that the Commission found:

First. The number of cars of grain, the aggregate number of pounds, and the tariff allowance on each class of cars making up the claim of the defendant in error.

Second. The Commission also found:

> "We find therefore that the complainant Updike Grain Company is entitled to receive of the defendant the sum of $6,742.10, with interest at six per cent from July 1, 1907" (Rec., p. 31, last three lines).

Third. In the order requiring the payment of this money to the defendant in error the Commission ordered its payment:

> "As reparation for undue discrimination by denying elevator allowance on certain shipments of grain, *which denial has been found by this Commission to have worked undue discrimination against said complainant, as more fully and at large appears in and by said report of the Commission, which said report is hereby referred to and made part of this order.*" (Italics ours.) (Rec., p. 33.)

Thus it will be seen that the Commission found (*a*) the performance of the service by complainant therein; (*b*) the denial of the allowance to it; (*c*) that such denial *"worked undue discrimination against said complainant,"* and (*d*) that because of such undue discrimination the defendant in

error was entitled to recover from the plaintiff in error the sum of $6,742.10 and interest thereon.

These findings, we submit, are sufficient to sustain our right of recovery. They would be amply sufficient as the findings of a court on which to base a judgment. If the cause had been tried originally in the circuit court without a jury, and the circuit court had made findings exactly as the Interstate Commerce Commission made them, could there be any question about the sufficiency of those findings to support a judgment? Clearly not.

In the petition filed in the circuit court it was alleged that the plaintiffs had theretofore filed a complaint with the Interstate Commerce Commission *"charging the Union Pacific Railway Company with discrimination against them in the matters and things hereinbefore set forth."* It also charged that issue had been joined, evidence introduced, and the order and judgment of the Commission had been duly entered. (Paragraph 12 of Petition, Record, page 8.)

The answer filed by the plaintiff in error admitted all the allegations of that paragraph of our petition. (Record, page 19, paragraph 12 of Answer.)

It therefore stood admitted that the findings and order of the Commission were responding to the issues presented by the complainant, and which issues were the same as those presented by our petition in the circuit court.

It was never the intention of Congress that the

shipper should be required to reproduce all the evidence in the circuit court that was offered before the Interstate Commerce Commission. To hold that the shipper must offer affirmative evidence to prove every charge in his complaint, irrespective of the finding of the Commission, would be to render the finding of the Commission entirely nugatory. Its value as evidence would be completely removed; and in this case we think the shipper would have been justified in relying entirely upon the findings of the Interstate Commerce Commission. But out of abundant caution we offered in evidence testimony substantiating every material allegation of our petition in the circuit court, and thus corroborated the findings of the Commission. Let us briefly call attention to that evidence and what was proven by it.

First. We proved by Mr. Anderson, the auditor of the Union Pacific, that during the period when the defendant in error was performing the service of unloading the cars at its elevator there was paid by the Union Pacific to our competitor, the Omaha Elevator Company, for exactly similar services, the sum of $30,864.47. (See Record, page 257.) We showed by him that during the same time there was paid to our competitor the Trans-Mississippi Grain Company, for exactly the same service, the sum of $17,124.46. (See Record, page 258.)

Second. As to the character of the cars on which our competitors received this payment, we

showed by Mr. Wright, who at the time these payments were made was an officer and employee of the Omaha Elevator Company, that payment was made the Omaha Elevator Company for unloading every car, no matter by whom owned, that arrived over the Union Pacific and was unloaded by the Omaha Elevator Company. On pages 152 and 153 of the record will be found Mr. Wright's testimony, as follows:

> "Q. Now, in making up those claims, which were afterwards paid, did you include in that grain which arrived in Union Pacific cars, also grain that arrived in cars owned by other lines here in Omaha, and grain that arrived over the Union Pacific in cars that were owned by foreign lines having no connection in Omaha?
>
> "A. Those claims included all cars received off the line of the Union Pacific Railroad Company.
>
> "Q. Irrespective of the ownership of the car?
>
> "A. Yes, sir.
>
> "Q. And paid on the same basis?
>
> "A. Yes, sir.
>
> "Q. The Union Pacific didn't cut out of your claims allowances on cars belonging to the Burlington or the Rock Island or the Milwaukee?
>
> "A. No, sir.
>
> "Q. And they didn't cut out of your claims elevation on cars belonging to the New York Central, Baltimore & Ohio or Pennsylvania, or anything of that kind?
>
> "A. No, sir.

"Q. Those were paid the same as the grain received in Union Pacific equipment?
"A. Yes, sir."

This is also shown by the testimony of Mr. Anderson, auditor of the Union Pacific (see Record, page 37), where he testified as follows:

"Q. Can you tell the court and jury whether or not during all that time when you were paying the allowances to the Omaha Elevator Company and the Trans-Mississippi, did you pay it merely on Union Pacific cars that were unloaded, or did you pay it on foreign cars as well?
"A. Paid it on all cars that were unloaded during that time.
"Q. If it was a Burlington or a Northwestern car, it was paid just the same?
"A. Yes, sir.
"Q. Or a Baltimore & Ohio car?
"A. Yes, sir.
"Q. The ownership of the car, whether it was Union Pacific, or whether owned by a foreign road, cut no figure?
"A. Cut no figure; no, sir."

It will thus be seen that, when it came to paying our competitors this elevation allowance, the character of the equipment and the ownership of the car was not taken into consideration. Our competitors received allowance on all grain unloaded at their elevator. We received it on none.

Third. But it is claimed that we should have offered affirmative proof that the grain we un-

loaded originated west of Gilmore, and it is urged we failed to do so and therefore should not be permitted to recover. Gilmore is a mere siding or passing track near the city limits of South Omaha. The trial court took judicial notice of its location. No cars of grain could arrive over the Union Pacific except such as necessarily originated west of Gilmore. It has certainly been made plain that when paying this elevation allowance to our competitors it was paid on all cars that arrived over the Union Pacific. An examination of the record will show that all the requirements of the Union Pacific in the matter of proof of the origin and destination of the grain were fully complied with by the defendant in error. The Union Pacific Railroad Company prepared certain forms on which these claims should be submitted to it. They were then to be submitted to Mr. Fisher, the agent of the Transit Inspection Bureau, by him checked against the records in the Union Pacific freight office, and by him determined as to whether or not the grain originated west of Gilmore and afterwards moved east of Council Bluffs. Mr. Wright testified, as shown on page 151 of the record, as follows:

> "At the time this tariff was issued, Mr. Anderson and myself got together, and we had a meeting in his office one afternoon and decided on the form to be used for drawing up these claims. That form, I understand, is still being used by the various companies, and after adopting this particular form I

> made up the claims in the office with the assistance of the bookkeeper, and from our shipping and receiving books."

Speaking further of these forms thus prepared by the Union Pacific Railroad Company, Mr. Wright said:

> "At the time we billed this grain out of Omaha we were compelled to attach the original expense bill or the shipping notice showing the inbound reference. That was attached to duplicate bills of lading and sent to Mr. Fisher's office to be checked and O. K.'d by Mr. Fisher. These expense bills are held by Mr. Fisher, and when claims are presented they are checked against the files in the Union Pacific office" (Rec., pp. 158, 159).

This, then, was the procedure adopted by the Union Pacific Railroad Company for the purpose of determining whether or not these elevator companies were entitled to this allowance. Mr. Fisher, the representative of the Transit Inspection Bureau, checked the claims against the record in the freight office of the Union Pacific Railroad Company and then certified to the company whether or not the grain had originated west of Gilmore and subsequently moved to points beyond Council Bluffs. Mr. Anderson, the auditor of the Union Pacific, in testifying to the claims presented by this defendant in error, stated as follows:

> "Q. Now, Mr. Anderson, during the years 1906 and 1907, were claims filed in your de-

partment by the —— —— and the Updike Grain Company for elevation allowance?

"A. Yes, sir.

"Q. Were those claims submitted on blanks furnished by the Union Pacific?

"A. I think most of them were, or amended later and made on the blanks.

"Q. Do you remember whether or not those or any of them were certified to by Mr. Fisher, agent of the——

"A. It is my recollection that they were." (Rec., p. 38.)

Thus it will be seen that the claims of the Updike Grain Company were certified to by Mr. Fisher, the representative of the railroad company. That certificate carried with it proof that the grain originated west of Gilmore and moved beyond Council Bluffs. It was on this certificate that all the claims of our competitors were paid. The fact that the claims of the Updike Grain Company, when submitted in the same manner and certified to by Mr. Fisher, were refused is but additional evidence showing the unjust and unreasonable discriminations practiced against the Updike Grain Company, and which discriminations constitute the basis of this action.

In the light of all this testimony, corroborating the findings of the Interstate Commerce Commission, it was certainly a matter of defense, to be shown by the plaintiff in error, if it claimed there was any substantial difference between the claims of the Updike Grain Company and that of its competitors. The burden of proof was then upon the

Union Pacific Railroad Company to show some reason why the claims of the Updike Grain Company should not be paid. It offered no evidence whatever which in any degree tended to show that there was any difference between the character of the service performed by these different elevator companies.

In the brief filed by counsel for plaintiff in error it is admitted that it was impossible for the Updike Grain Company to return to the Union Pacific Railroad Company the cars falling within Class B of its claim. (See Brief, page 42.) But as to those falling within Class C, namely, those foreign cars which when made empty were again loaded in the direction of the home road, it is urged that under the rules these might have been returned either loaded or empty. We believe, however, counsel do not fully comprehend the meaning of the circular or rules and regulations governing the movement of empty cars of this character, issued by the Union Stock Yards Company. Those rules appear as Exhibit C, Record, pages 12 and 13. An examination of this exhibit shows that an exception is made as to the disposition of foreign cars received from the Union Pacific, and it is expressly provided that "Foreign cars received from the U. P. R. R. Co. may be delivered, loaded, as routed." This means that foreign cars, such as Pennsylvania cars or New York Central cars, when arriving over the Union Pacific, switched to the tracks of the Stock Yards Company and then unloaded, may be delivered by the employees of the

Stock Yards Company to any industry located on the tracks of the Stock Yards Company that desires the car for loading purposes. In other words, if the Updike Grain Company desired to use this car it was privileged to do so. If it did not desire to use it then any packing house or any other industry located upon the tracks of the Union Stock Yards Company was privileged to load the car. It was not for the Updike Grain Company to say what should be done with it. If it did not desire to load it, it was beyond its power to say what should be done with it or control it in any degree. The Stock Yards Company had the right to give the empty car to any industry upon its lines that desired it. It therefore follows that, as to these cars, it was as much without the power of the Updike Grain Company to return them to the Union Pacific Railroad Company as it was without its power to return those empty cars falling within Class B. Such was the view taken of these provisions by the Interstate Commerce Commission, by the circuit court, and by the Circuit Court of Appeals. Hence, no different rule can be applied to cars falling within Class B and Class C. If the defendant in error is entitled to recover on cars falling within Class B, it is also entitled to recover on cars falling within Class C.

Respectfully submitted,

CONSTANTINE J. SMYTH,
EDWARD P. SMITH,
Attorneys for Defendant in Error.

UNION PACIFIC RAILROAD COMPANY *v.* UPDIKE GRAIN COMPANY AND CROWELL LUMBER AND GRAIN COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Nos. 353, 354, 355, 356. Argued October 18, 1911.—Decided December 4, 1911.

Interstate Commerce Commission v. *Diffenbaugh*, *ante*, p. 42, followed to effect that under the Interstate Commerce Law, as amended by the act of June 29, 1906, c. 3591, 34 Stat. 584, 590, elevation of grain is included in transportation, and, subject to the power of the Commission to determine the reasonableness of the payments, carriers can compensate owners of grain in transit for elevation services rendered in connection therewith.

Although a carrier may have had an ulterior motive in establishing a general rate of compensation for services rendered to it in connection with goods in transit, the real consideration is the service rendered; and even if the carrier does not realize the desired benefit it cannot deprive one actually rendering the service of the compensation on the ground of non-compliance with regulations of an association of which the carrier is a member and over which the party rendering the service has no control.

A carrier must treat all alike. It cannot pay one shipper for services rendered to his goods in transit, and, by enforcing an arbitrary rule, deprive another shipper rendering similar services of compensation therefor.

A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail.

In this case *held*, that the Union Pacific Railroad Company could not refuse to pay the owner of an elevator located on other railroads compensation for elevating grain similar to that paid to owners of elevators located on its own railroad on account of failure to return cars within an arbitrary and unreasonable time fixed by the Union Pacific; but also *held* that such cars should be returned within a reasonable time in order to entitle the parties rendering service to compensation therefor.

178 Fed. Rep. 223, affirmed.

THE facts are stated in the opinion.

Mr. Maxwell Evarts, with whom *Mr. F. C. Dillard* and *Mr. Henry W. Clark* were on the brief, for plaintiff in error.

Mr. Edward P. Smith, with whom *Mr. Constantine J. Smyth* was on the brief, for defendants in error.

Mr. Constantine J. Smyth and *Mr. Edward P. Smith*, with whom were *Mr. Nelson H. Loomis*, *Edson Rich*, *F. C. Dillard*, *R. W. Blair* and *E. H. Crocker*, filed a brief for plaintiff in error on motion to dismiss.

MR. JUSTICE LAMAR delivered the opinion of the court.

In 1899, the Union Pacific found it desirable to have grain unloaded at its terminals in Council Bluffs in order that cars might be promptly returned for use on its line. In consideration that Peavey would there erect and maintain an elevator, it agreed to pay him 1½ cents per hundred for elevating grain. It subsequently made similar contracts with what are called "Peavey Companies" which had elevators along its tracks in the cities of Omaha, South Omaha and Kansas City, terminal points of the Union Pacific. Thereafter it agreed, on certain conditions, to pay for similar service by elevator companies in the same cities, even though the elevators were not located immediately on the railroad tracks. It thereupon filed a Tariff Circular with the Commission, in which the Union Pacific recited that "to expedite the movement, and to secure the prompt release and return of equipment, an allowance . . . will be made" to elevators performing the service on through grain in carloads, transferred by the elevators at the points named:

"No allowance will be made when more than forty-eight hours elapse between time of delivery . . . to the elevator, or connecting lines and the release and return of the empty cars to the Union Pacific."

That company was and is a member of a railway association, which regulated the switching, loading and unloading of cars. One of its rules provided that:

"Cars received loaded in switching service must be confined to switching territory and when made empty must be returned to the owner if a direct connection within that territory or otherwise to the road from which received or may be loaded in accordance with Rule 2 a, b or c.

Rule 2 (a). "Loaded via any route so that the home road will participate in the freight rate; (b) loaded to the road from which originally received, if such loading is in the direction of the home road, but not otherwise; (c) loaded to an intermediate road in the direction of the home road."

As the Peavey elevators were located alongside the tracks of the Union Pacific, these rules did not affect their right to recover for elevation service. But, as the elevators of the defendants in error were located on the lines of other railroads in Omaha and South Omaha, it frequently happened that cars, after being unloaded at their elevators, were not returned to the Union Pacific, and that others were not returned within 48 hours. In those cases the Union Pacific refused to make payment for unloading these cars. The defendants in error filed a complaint with the Commission, asking for reparation. An order to that effect having been granted, they brought a joint suit for reparation.

Most of the allegations in the complaint were denied by the Union Pacific in its answer, which claimed that nothing was due, because the plaintiffs had not returned the cars within 48 hours stipulated in the tariff on file. It also alleged that the grain had been unloaded through plaintiffs' private elevators, which were not operated in the exercise of any public duty, but for the purpose of private gain; that the handling of the grain was for the

purpose of having it weighed, stored, inspected, cleaned, mixed or otherwise treated in the elevator, and that the tariff allowing for elevator charges in their elevator was unlawful.

After hearing evidence showing the amount of grain elevated for which payment had not been made, and considering the tariff and rules of the switching company, the court directed a verdict in favor of each of the plaintiffs for the amount shown to be due them. The judgment as modified was affirmed by the Circuit Court of Appeals, 178 Fed. Rep. 223, and the railroad brought the case here. There are forty assignments of error, but they need not be separately considered, as the case must be determined by a few controlling principles:

1. The Union Pacific's contention that payment for reparation cannot be made to the owner who stores and mixes the grain must first be considered.

The long mooted question as to whether elevation was such a part of transportation as to bring it within the jurisdiction of the Interstate Commerce Commission was answered by the act of June 29, 1906, 34 Stat. L. 584, 590, c. 3591, in which Congress declared that "the term 'transportation' shall include . . . all . . . facilities of shipment, . . . irrespective of ownership, . . . and all services in connection with the . . . elevation, and transfer in transit . . . and handling of property transported." Carriers were required "to provide and furnish such transportation upon reasonable request therefor."

The act recognized that the shipper himself might own the elevator or other facility included within the definition of transportation. For § 4 (34 Stat. 590) provides that "if the owner . . . renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable,"

the Commission being authorized to determine what was reasonable.

This act was passed after the decision by the Commission in 1904 (10 I. C. C. 309), that the Peavey contract was valid, and after the recommendation in its report for 1905 (p. 11), that it should be given authority to determine whether the allowance paid to the owner was just. The statute must be taken as a legislative recognition of the long-continued practice and a declaration that the incidental advantage derived by the owner was not undue.

In pursuance of the authority thus expressly conferred the Interstate Commerce Commission, in April, 1907 (12 I. C. C. 86), fixed the allowance for elevating grain at ¾ of a cent per hundred pounds, being actual cost, with no allowance whatever for profit. Its final order (14 I. C. C. 315), prohibiting any payment to the owner who performed this transportation service was reversed, as being beyond the jurisdiction of the Commission, because Congress had expressly permitted such payment to be made (*Interstate Commerce Commission* v. *Diffenbaugh, Same* v. *Peavey, ante*, p. 42). The language of the statute and this decision answer the Union Pacific's contention that it was unlawful to pay these companies for transportation services.

2. The Union Pacific's desire to have cars promptly unloaded so that they might be returned to its own line may have been the principal motive which induced it to agree to pay elevator charges. But the consideration, moving between the carrier and the elevator, was the service performed by the latter in unloading grain at terminal points. This relieved the carrier of the expense of building similar structures and avoided the delay of having the grain transferred from one car to another by the slow process of shovelling. When the service was rendered, the carrier received value for which it was bound to pay, whether performed by the owner of the grain or

some other person hired for the same purpose. Having earned the compensation, the elevator company could not be deprived of its right because foreign cars were not returned to the Union Pacific under the rules of the railway association, of which the Union Pacific was a member and over which the elevator companies had no control.

3. For elevating grain from like foreign cars the Peavey Companies were paid because their elevators happened to be located on the Union Pacific tracks. But if the rule is valid against the plaintiffs, it would put it in the power of the carrier to say which elevator should be paid, and which not paid, for performing the same transportation service. It could load grain belonging to the plaintiffs into foreign cars, and in spite of the service rendered by them to the carrier in unloading, no payment would be made, because these foreign cars, under the rule, were not returned to the Union Pacific. It is not necessary that any such improper purpose should be shown to exist. It might have existed, and if so, could not be proved by the injured party. The power to make such a discrimination would prevent the enforcement of any regulation frequently having such operation.

The carrier cannot pay one shipper for transportation service and enforce an arbitrary rule which deprives another of compensation for similar service. To receive the benefit of such work by one elevator without making compensation therefor would, in effect, be the involuntary payment by such elevator of a rebate to the railroad company, for it would enable the railroad to receive more net freight on its grain than was received from its competitor located on the railroad's tracks. This cannot be directly done, nor indirectly by means of regulation. A rule apparently fair on its face and reasonable in its terms may, in fact, be unfair and unreasonable if it operates so as to give one an advantage of which another similarly situated cannot avail himself.

4. The trial court was right in holding that the railroad company must make reparation by paying for the elevation of grain in those cars not returned in forty-eight hours, because they belonged to the switching company, or to a road which had a direct connection in the switching territory (2 a), and in those which when emptied were routed so that the home road participated in the freight rate (2 b).

But while elevators off the tracks of the Union Pacific cannot be affected by unreasonable rules tending to deprive them of just compensation, neither can they disregard the obligation promptly to unload, so that the cars might be put in service as soon as practicable. This was conceded by the defendants in error, and they accepted the ruling that they were not entitled to recover for elevating grain out of some 200 cars, which could have been unloaded and returned in a much shorter time, but which they detained beyond the forty-eight hours.

Judgments affirmed.

MR. JUSTICE MCKENNA and MR. JUSTICE HUGHES concur in the result in view of the decision in *Interstate Commerce Commission* v. *Diffenbaugh*, *Same* v. *Peavey*, *ante*, p. 42.